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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1944~~ 45

No. ~~1158~~ 58

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

FILED APRIL 13, 1945

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1158

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

Appeal from the District Court of the United States for the Eastern District of Louisiana

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INDEX

1 [Caption omitted.]

2 In District Court of the United States for the Eastern District of Louisiana, New Orleans Division

Civil Action Number 956

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER, PLAINTIFFS

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Complaint

Filed Nov. 14, 1944

3 *To the Honorable, the District Court of the United States for the Eastern District of Louisiana:*

I

Plaintiffs, Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener, are citizens of the United States and of the State of Louisiana, and are resident and domiciled in Shreveport in the Western District of Louisiana.

II

The defendant, Joachim O. Fernandez, is the Collector of Internal Revenue of the United States for the District of Louisiana. His official residence, and his personal domicile are both in the city of New Orleans, in the Eastern District of Louisiana, and he is being sued herein in his official capacity as Collector of Internal Revenue.

III

The amount in controversy is the sum of One Hundred Sixty-Two Thousand Three Hundred Twenty-Nine Dollars and Fifty-Nine Cents ($162,329.59), together with six (6%) percent per annum interest thereon from August 10th, 1944.

IV

The amount sued for represents part of a payment made
4 to the aforesaid Collector of Internal Revenue in virtue of an estate tax deficiency assessment levied against these

plaintiffs by the Bureau of Internal Revenue, and, therefore, paid by them to the aforesaid Collector solely by reason of the necessity and compulsion of such payment arising out of such deficiency assessment.

V

Said deficiency Estate Tax purported to have been levied upon these plaintiffs as the sole heirs of Sam Wiener, Jr., a citizen of the United States and a resident of the Western District of Louisiana, who died in Shreveport on December 1, 1942. The Estate Tax return required by law was duly filed by plaintiffs, and payment made thereunder in the sum of One Hundred Seven Thousand One Hundred Seventy-Eight Dollars and Fifty-Seven Cents ($107,178.57).

VI

After the filing of said Estate Tax return, upon an audit thereof by the Revenue Agent, a deficiency was proposed of One Hundred Sixty-Five Thousand Eight Hundred Twenty One Dollars and Fifty-Seven Cents ($165,821.57), together with interest amounting to Three Thousand Eight Hundred Seven Dollars and Eight Cents ($3,807.08), which total—amounting to One Hundred Sixty-Nine Thousand Six Hundred Twenty-Eight Dollars and Sixty-Five Cents ($169,628.65)—was, as aforesaid, paid by these plaintiffs to the aforesaid Collector on August 10, 1944.

5 VII

The said decedent, the father of these plaintiffs, had been a resident and citizen of Louisiana, and domiciled therein, for more than forty years. In 1907 he was married to Florence Loeb, with whom he lived continuously as husband and wife until his death. During said marriage, he and his wife acquired a large amount of community property, and he acquired some property in the State of Mississippi wherein the community system does not prevail.

VIII

The said decedent died testate, leaving his entire estate to these plaintiffs. The will of the decedent was duly probated in the First Judicial District Court of Caddo Parish, Louisiana, wherein, consistently with the law of Louisiana, the estate being entirely solvent and debts (with the exception of death taxes) small, there was no administration. Consequently, no Executor or Administrator was ever appointed, but these plaintiffs were sent into possession

by said Probate Court of their father's estate as his sole and unconditional heirs.

IX

The final Estate Tax Return, form 706, was timely filed by the three heirs above named, disclosing an estate tax liability of $107,078.47, which tax was, contemporaneously with the filing of the return, duly paid. In said Estate Tax Return, the
6 plaintiffs reported all of the property of which their father had been the owner, and of which he had the power of disposition, namely, the whole of his separate property, together with the undivided one-half which, under the law of Louisiana, he owned in all of the community assets.

X

The aforesaid deficiency assessment, paid as aforesaid by these plaintiffs, was based upon the action of the Bureau of Internal Revenue in its adjustment of the estate tax liability, through its inclusion in the taxable estate of the decedent of the value of the entirety of the assets of the community, together with some readjustment of valuations.

Whereupon, as above recited, the aforesaid notice of deficiency issued and payment was then made, solely to avoid the accumulation of interest and the imposition of penalties which would otherwise have accumulated and been imposed if the additional assessment had not been so paid. No claim is made by these plaintiffs in respect to increases in valuations over those proposed in their estate tax return.

The amount herein sued for represents that part of the deficiency assessment which was based by the Bureau of Internal Revenue solely upon its application of Section 402 (b) (2) and Section 404 (a) of the Revenue Act of 1942 (56 Statutes at Large, 942 and 944), under which said Bureau undertook to base the Estate
7 Tax not upon the assets of the decedent, but upon the assets in which the decedent and his surviving widow were each an owner of an equal undivided one-half interest.

XI

Promptly upon the payment of the said deficiency, to wit, on August 14, 1944, these plaintiffs filed, as provided by law, with the said Collector of Internal Revenue their claim for refund in the sum herein demanded.

The claim for refund was based upon the reasons set out in paragraph XII of this complaint; was duly transmitted by the Collec-

tor to the Commissioner of Internal Rvenue; and was by the said Commissioner formally rejected on the 31st day of October 1944.

XII

And now these plaintiffs show that the said additional assessment purports to have been made under the provisions of Section 402 (b) (2) of the Revenue Act of 1942, and Section 811 (e) of the Internal Revenue Code as amended thereby, and under Section 404 (a) of the Revenue Act of 1942, and Section 811 (g) (4) of the Internal Revenue Code as amended thereby, each of which provisions plaintiffs now aver, as they set out in their aforesaid claim for refund, to be violative of the Constitution of the United States, and hence null and void and without legal effect.

8 Plaintiffs show that the statutory provisions above referred to are inconsistent with and violative of the following provisions of the Constitution of the United States:

(a) the provisions of the Fifth Amendment to the Constitution of the United States, which provide that no person shall be deprived of property without due process of law;

(b) Article 1, Section 8, which provides that all duties, imposts and excises shall be uniform throughout the United States;

(c) Article 1, Section 2 and Section 9, which provide that direct taxes shall be apportioned among the several states in accordance with their population;

(d) the provisions of the Tenth Amendment to the Constitution of the United States, which provides that all powers not granted to the United States by the Constitution and its amendments, are reserved to the several states and to the people thereof.

XIII

During the existence of the marriage between decedent and his surviving wife, he purchased fifteen life insurance policies in various amounts, all payable directly to Florence Loeb Wiener as beneficiary. One-half of the amount payable to said beneficiary under said policies was properly returned in the Estate Tax Return. The additional assessment was based, in part, upon the action of the taxing authorities in including in the taxable estate the entire amount of the said insurance, instead of the one-half interest owned by the decedent under the local law.

9 This action purported to have been had under the provisions of Section 404 (a) of the Revenue Act of 1942 and Section 811 (g) (4) of the Internal Revenue Code as amended thereby: all of which provisions these claimants assert to be null and void, as violative of the Constitution of the United States as above set out in detail.

And plaintiffs aver that any and all regulations of the Bureau of Internal Revenue purporting to carry into effect said unconstitutional statutes, are likewise null and void.

Wherefore, plaintiffs demand judgment against said defendant for the aforesaid sum of One Hundred and Sixty Two Thousand Three Hundred Twenty-Nine Dollars and Fifty-Nine Cents ($162,329.59), together with interest as above claimed, and all costs of suit.

Sidney L. Herold,
SIDNEY L. HEROLD,
1625 Slattery Building,
Shreveport, Louisiana.
Charles E. Dunbar, Jr.,
CHAS. E. DUNBAR, Jr.,
United Fruit Building,
New Orleans, Louisiana.

HEROLD, COUSIN & HEROLD,
1625 Slattery Building,
Shreveport, Louisiana.
PHELPS, DUNBAR, MARKS & CLAVERIE,
United Fruit Building,
New Orleans, Louisiana.

10 In United States District Court

Answer

Filed December 8, 1944

Comes now defendant by his attorney, Herbert W. Christenberry, United States Attorney for the Eastern District of Louisiana, and in answer to plaintiffs' complaint admits, denies, and alleges as follows:

I

Admits the allegations contained in paragraph I of plaintiffs' complaint.

II

Admits the allegations contained in paragraph II of plaintiffs' complaint.

III

Admits the allegations contained in paragraph III of plaintiffs' complaint.

IV

Admits the allegation contained in paragraph IV of plaintiffs' complaint.

V

Admits the allegations contained in paragraph V of plaintiffs' complaint and avers that the deficiency in federal estate taxes was duly assessed against plaintiffs and each of them as transferees of the property of the estate of Samuel Wiener, deceased.

VI

Admits the allegations contained in paragraph VI of plaintiffs' complaint.

VII

Admits the allegations contained in paragraph VII of plaintiffs' complaint.

VIII

Admits the allegations contained in paragraph VIII of plaintiffs' complaint.

IX

Denies all the allegations contained in paragraph IX of plaintiffs' complaint, except admits that a federal estate tax return on Form 706 was filed by plaintiffs reporting a federal estate tax due of $107,078.47 which was paid and admits that there was reported in the federal estate tax return, as part of the gross estate for estate tax purposes, decedent's separate property and one-half of the community property.

X

Admits the allegations contained in paragraph X of plaintiffs' complaint, except denies that the estate taxes sought to be recovered were based upon the inclusion in the taxable estate of property owned by decedent and his widow in equal, undivided one-half interests.

XI

Admits the allegations contained in paragraph XI of plaintiffs' complaint.

11 XII

Denies all the allegations contained in paragraph XII of plaintiffs' complaint.

XIII

Denies all the allegations contained in paragraph XIII of plaintiffs' complaint, except admits that during the existence of the marriage between decedent and his widow decedent purchased fifteen life insurance policies, all payable to Florence Loeb Wiener, as beneficiary; that one-half of the amount payable to the beneficiary under the policies was returned in the federal estate tax return and that the additional assessment was based in part upon the inclusion in the taxable estate of the entire amount of the insurance under the provisions of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942.

Wherefore, having fully answered defendant prays judgment dismissing the complaint and for costs.

(Signed) HERBERT W. CHRISTENBERRY,
United States Attorney.
(Signed) A. P. SCHIRO, III,
A. P. Schiro, III.
Assistant United States Attorney,
237 Post Office Building,
New Orleans, Louisiana.

12 In United States District Court

[Title omitted.]

Agreed statement of facts

Filed March 15, 1945

It is hereby stipulated and agreed that this case be submitted to the Court upon the following statement of facts, to wit:

I

Sam Wiener, Jr., the father of the plaintiffs, was a native born citizen of the United States. He died on December 10, 1942, in Shreveport, Louisiana, where he had been domiciled for more than forty years, leaving a last will and testament in which he constituted the present plaintiffs his sole heirs. The will was duly

probated in the First Judicial District Court of Caddo Parish, the probate court having jurisdiction in the premises, and judgment was therein rendered sending these plaintiffs, as the sole heirs of the said decedent, into possession of all of the property of the decedent. Conformably to the practice in Louisiana, the debts being inconsequential, there was no administration, and consequently no appointment of an executor or administrator.

II

The said decedent was married in 1907, in Shreveport, to Florence Loeb, with whom he lived in that relation until his death.

During the marriage, said Sam Wiener, Jr., was engaged in many different kinds of business, such as the grocery business, lumber business, real estate and later, in investments of various character. All assets of every character, movable and immovable, which stood or record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the
13 marital community which had existed between him and his
surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside of the household, nor did she receive from anyone salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener.

III

Within the delay fixed by law, the plaintiffs, in their capacity as the sole heirs of Sam Wiener, Jr., deceased, filed with the Bureau of Internal Revenue their Estate Tax Return, Form 706. In that return, they reported a net estate of Four Hundred Seven Thousand Two Hundred Eighty-Six Dollars and Thirty-Three Cents ($407,286.33) for the additional tax, and a net estate of Three Hundred and Sixty-Seven Thousand Two Hundred Eighty-Six Dollars and Thirty-Three Cents ($367,286.33) for the basic tax.

In said Estate Tax Return, these plaintiffs reported the entire value of all the separate property owned by their father, plus the one-half of the net value of the community which had existed between their father and his surviving wife. Included in said community, and therefore reported only to the extent of one-half thereof, were fifteen policies of life insurance contracted for by decedent during the said marriage, all naming the wife as beneficiary, and each and all of the premiums on which had been paid for with community funds. Each of said policies reserved the

right to the insured of changing the beneficiary. The face value of said policies aggregated Seventy-Seven Thousand Three Hundred Seventy-One Dollars and Seventy Cents ($77,371.70), of which, as aforesaid, one-half was reported in said Estate Tax Return.

Under the return as filed, there was an estate tax liability of One Hundred Seven Thousand Seventy-Eight Dollars and Forty-Seven Cents ($107,078.47), which sum, contemporaneously with the filing of their return, plaintiffs paid to the defendant, as Collector of Internal Revenue for the District of Louisiana, at New Orleans.

IV

The said Estate Tax Return, following the usual process of the Bureau of Internal Revenue, was referred to Field Agents for audit. As a result thereof, certain deficiencies were proposed, which formed the basis of protest. After hearing of the said protest, in accordance with the applicable regulations of the Bureau of Internal Revenue, a deficiency was proposed in the sum of One Hundred Sixty-Five Thousand Eight Hundred Twenty-One Dollars and Fifty-Seven Cents ($165,821.57), together with interest. This deficiency was based upon the
14 holding by the Bureau of Internal Revenue that the valuation of the net estate for the purpose of the basic tax was Nine Hundred Eight Thousand Two Hundred Eighty Dollars Thirty-Nine Cents ($908,280.39), and for the additional tax, Nine Hundred Forty-Eight Thousand Two Hundred Eighty Dollars Thirty-Nine Cents ($948,280.39). This increase results in part from

(a) the Bureau's inclusion in the taxable net estate of the decedent of the total value of all of the community property of every character; and

(b) the inclusion of the total proceeds of the life insurance above referred to, the addition from that source being Thirty-Eight Thousand Six Hundred Eighty-Five Dollars Eighty-Five Cents ($38,685.85).

Notice of such deficiency issued to these plaintiffs as the sole heirs of Sam Wiener, Jr., pursuant to § 930 of Title 26 of the United States Code, and said amount, i. e., the principal sum of One Hundred Sixty-Five Thousand Eight Hundred Twenty-One Dollars and Fifty-Seven Cents ($165,821.57), and interest in the amount of Thirty-Eight Hundred Seven Dollars and Eight Cents ($3,807.08) was paid by plaintiffs to the present defendant, Joachim O. Fernandez, in his official capacity as Collector of

Revenue for the District of Louisiana, on August 10, 1944. The payment was made by Samuel G. Wiener, William E. Wiener, and Jacques I. Wiener, heirs of the Estate of Sam Wiener, Jr., in response to a formal "Notice of Assessment and Demand" on the usual government form addressed by the Honorable J. O. Fernandez, Collector of Internal Revenue, to "Estate of Sam Wiener, Jr., Samuel G. Wiener, William E. Wiener, and Jacques L. Wiener, Heirs," and in connection with said payment, said "Notice and Demand" was returned to plaintiffs marked "paid" as of August 10, 1944, by the Collector of Internal Revenue at New Orleans.

The said amount was paid by petitioners solely to avoid the accumulation of interest and the imposition of penalties which otherwise would have been imposed if such additional assessment had not been so paid.

The aforesaid Collector, on the other hand, in demanding such taxes and interest, had—in law—probable cause therefor, in that he was acting in accordance with instructions of his superior officer; and in the event of a decision in this case adverse to this defendant, he is entitled to a Certificate of Probable Cause.

15

V

On August 12, 1944, these plaintiffs filed their claim for refund of the amount sued for herein, said claim being filed on the official Form 843.

On October 31, 1944, said claim for refund was rejected in its entirety by the Commissioner of Internal Revenue.

VI

There exists no controversy between the parties respecting valuations. The amount claimed by the plaintiffs in their claim for refund, and which forms the subject matter of this suit, represents that part of the deficiency assessment resulting entirely from the application by the Bureau of Internal Revenue of the provisions of Section 402 (b) (2) and of Section 404 (a) of the Federal Revenue Act of 1942; that is to say, in the inclusion by the Bureau of Internal Revenue in the taxable estate of the decedent the entire community property (rather than only one-half thereof as returned), including the entire proceeds of the life insurance above referred to.

In the event it should be held that only one-half of the community property is taxable the deductions shall be adjusted so as to eliminate one-half of the community debts and expenses.

In witness whereof, the attorneys of record of the respective parties have executed this agreement on the 14th day of March 1945.

SIDNEY L. HEROLD.
Sidney L. Herold,
CHARLES E. DUNBAR, Jr.,
Charles E. Dunbar, Jr.,
Attorneys for Plaintiffs.
HERBERT W. CHRISTENBERRY.
Herbert W. Christenberry,
United States Attorney.
A. P. SCHIRO, III,
A. P. Schiro, III,
Assistant United States Attorney,
Attorneys for Defendant.

16 In United States District Court

Minute entry

March 15, 1945

Case called, hearing and submission.

This cause came on this day to be heard before the Court on the pleadings, evidence and stipulation of facts.

Present: Sidney L. Cousin; Charles E. Dunbar. Attorneys for plaintiff. A. P. Schiro, III. U. S. Asst. Attorney; J. P. Garland, Special Asst. to Attorney General.

Whereupon, after hearing argument of counsel for respective parties the matter was taken under submission by the Court, and the plaintiffs were allowed until Monday March 19, 1945 to file briefs.

17 In United States District Court, Eastern District of Louisiana, New Orleans Division

No. 956 Civil Action

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE

Herold, Cousin and Herold (Sidney L. Herold); Phelps, Dunbar, Marks and Claverie (Charles E. Dunbar), Attorneys for Plaintiffs.

Samuel O. Clark, Jr., Assistant Attorney General; Andrew D. Sharpe, Helen R. Carloss, James P. Garland, Special Assistants to the Attorney General; Herbert W. Christenberry, United States Attorney, Attorneys for Defendant.

R. N. Gresham, Palmer Hutcheson, J. P. Jackson, Harry C. Weeks, Amici Curiae.

Opinion

(Filed March 31, 1945)

BORAH, District Judge.

This action was filed by the universal legatees and heirs of Sam Wiener, Jr., deceased, to recover an alleged overpayment of Federal Estate taxes in the amount of $162,329.59, with interest. The case was tried by the court without a jury on an agreed statement of facts. The stipulated facts, incorporated herein by reference, reveal the following:

Plaintiffs are the sons of Sam Wiener, Jr., who died on December 10, 1942 in Shreveport, Louisiana, leaving a last will and testament in which he constituted the present plaintiffs his sole heirs. Decedent was married in Shreveport, Louisiana, in the year 1907 to Florence Loeb with whom he lived from that time until his death.

18 "During this marriage, Sam Wiener, Jr., was engaged in many different kinds of business, such as the grocery business, lumber business, real estate, and later, in investments of various character. All assets of every character, movable and immovable, which stood of record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside the household, nor did she receive from any one salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener."

In the Federal Estate Tax Return filed on behalf of the estate of Sam Wiener, Jr., deceased, plaintiffs reported the entire value of all of the separate property owned by decedent, plus the one-half of the net value of the community which had existed between decedent and his surviving wife. Included in said community, and therefore reported only to the extent of one-half thereof, were fifteen policies of life insurance contracted for by decedent during the said marriage, all naming the wife as beneficiary, and each and all of the premiums on which had been paid with community

funds. Each of said policies reserved the right to the insured of changing the beneficiary.

Under the return as filed there was an estate tax liability of $107,078.47 and this sum was paid.

In the audit of the Federal Estate Tax Return the Commission of Internal Revenue assessed a deficiency of federal estate taxes of $165,821.57, which together with interest in the amount of $3,807.08 was paid by plaintiffs to defendant herein on August 10, 1944. The additional assessment resulted in part from the inclusion by the Commissioner of Internal Revenue in decedent's taxable estate of the entire value of all of the community property of every character and the inclusion in the taxable estate of the total proceeds of the life insurance above referred to.

19 Claim for refund of the amount sued for herein was filed by plaintiffs on August 12, 1944, and said claim was rejected in its entirety by the Commissioner of Internal Revenue on October 31, 1944.

"There exists no controversy between the parties respecting valuations. The amount claimed by the plaintiffs in their claim for refund, and which forms the subject matter of this suit, represents that part of the deficiency assessment resulting entirely from the application by the Bureau of Internal Revenue of the *the* provisions of Section 402 (b) (2) and of Section 404 (a) of the Federal Revenue Act of 1942; that is to say, in the inclusion by the Bureau of Internal Revenue in the taxable estate of the decedent the entire community property (rather than only one-half thereof as returned), including the entire proceeds of the life insurance above referred to."

Section 811, subsections (e) and (g) of the Internal Revenue Code, the applicable statute, was amended by Sections 402 (b) (2) and 404 (a), respectively, of the Revenue Act of 1942. This case presents the question of the constitutional validity of Sections 402 (b) (2) and 404 (a). For convenience of discussion I shall hereinafter refer only to Section 404 (b) (2) as the constitutional questions raised by plaintiffs in respect to this amending section apply with equal force to Section 404 (a).

Section 402 (b) (2) of the Revenue Act of 1942 provides that there shall be included in a decedent's gross estate the full value of all property—

"to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compen-

sation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

20 By its express terms this statute provides that all property held by a decedent and spouse in community shall be included in the gross estate of the decedent, except that portion shown to have been received as compensation for personal services actually rendered by the survivor, or derived from such compensation, or from the separate property of the survivor, but in no case shall such interest included in the gross estate be less than the share over which the decedent had a testamentary power of disposition.

The community property with which we are concerned in the instant case is of the type which does not fall within either exception in the statute. We have therefore a type of community property in which the first spouse to die is taxed on the whole, including the survivor's share.

The fact that section 402 (b) (2) allows all property which can be shown to have been received for personal services actually rendered or derived originally from such compensation or from separate property of the surviving spouse does not operate in aid of its validity in Louisiana. All income of the husband is presumed under the law of this state to be community property (Civil Code Art. 2405). Furthermore "compensation for personal services actually rendered" falls into the community (Article 2402) regardless of whether such service be rendered by the husband or by the wife living together as such. To charge the heirs with the burden of showing what part of the community consisted of the survivor's separate earnings or separate property would not only be impracticable but would have the effect of denying one of the most important principles of the community property system, the theory that the gains of the community automatically vest in the husband and wife equally, each having full ownership of one-half of such gains. (Arts. 2402, 2406.) Moreover, section 402 (b) (2) itself denies this allowance by providing that in no case may the gross estate be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Thus the statute first states, in
21 effect, that community property, for taxation purposes, will be regarded as the separate property, of each spouse to the extent that it was earned by that spouse, then suddenly announces a recognition of the surviving spouse's half interest in the community, regardless of its source by providing that the estate of the spouse dying first is taxable to the extent of at least one-half the community in all instances.

The Federal estate tax is not a tax on property, but on the transmission of property from the dead to the living. United States v. Perkins, 163 U. S. 625; Plummer v. Coler, 178 U. S. 115. This statute abolishes completely as to community partnership property only the test of ownership at death as being the controlling factor in measuring the tax, and substitutes therefor, as to the bulk of such property, the conception of dual, but complete, ownership by both spouses, so that this bulk is taxed as a part of the gross estate on the first to die, depending not on source, actual ownership or management, but upon the accidental circumstance of which spouse predeceases the other. As to that property received or derived from compensation for personal services actually rendered or traceable to income from separate property, the source controls only in the event the first to die received the compensation or owned the separate property, and all such property must be included in such recipient's gross estate. If the first to die did not receive the compensation or the derivatives from separate property, source is completely disregarded, and one-half is included in the gross estate of such decedent. Power of testamentary disposition limits the amount to be included in the gross estate, so it can not in any case be less than the amount over which the decedent had power of testamentary disposition and thus in certain events a third and different rule of taxation is applied.

"The nature and character of the right of the wife in the community for the purpose of taxation is peculiarly a local question" and determination of the state court thereto is not reviewable by the Supreme Court. Moffitt v. Kelly, 218 U. S. 400, 406; Lang v. Commissioner, 304 U. S. 264. As was said, United States v. Goodyear, 99 F. (2d) 523, 526, "the present rule seems to
22 be that community property law is applicable in determining the amount of the gross estate" for federal estate tax purposes. "Every marriage contracted in this state, superinduces of right partnership or community of acquest or gains if there be no stipulation to the contrary," (Article 2399), and it is the settled law of Louisiana "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired." Succession of Wiener, 203 La. 649, 657, 14 So. (2d) 475.

"In Louisiana the wife has a present vested interest in com- 7
munity property equal to that of her husband." Bender v. Pfaff, 282 U. S. 127,132. "The wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity." Succession of Wiener, supra, at page 666. The rights of the wife as well as those of the husband in and to the marital gains grow out

of the marriage contract itself and do not originate only when it is dissolved. She is the half partner and owner of all the acquisitions made during the existence of the community whether they be property or income. She is afforded the same privilege as her husband of disposing of her interest therein by will, and in the absence of a will, at her death her interest in the community property passes to her legal heirs in the same manner as her husband's interest therein passes to his legal heirs, in the absence of a will.

The Louisiana Code speaks of the community always as a partnership, the husband being its manager. The husband is the managing partner of the partnership but his powers of management are restricted and circumscribed. His management of the wife's interest in the property terminates upon separation, upon divorce; upon a showing of fraud, or whenever the husband proves to be incompetent, a bad manager, of a reckless and speculative disposition or whenever his affairs are in such disorder that her property rights are jeopardized. Under the statutes of Louisiana the wife can by ante-nuptial agreement with her husband stipulate that there shall be no community, or by agreement make herself rather than him the managing partner, or agree that the community partnership shall be managed jointly by husband and wife or vary the partnership agreement in any other way they see it. Failure
23 to exercise such option carries with it the conclusive presumption that they had elected that future acquisitions should be under the regime of the ordinary community which "consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife and of the estate which they may acquire during the marriage," etc. (Article 2402.) Accordingly all property found in the possession of either spouse upon dissolution of the community is presumed to be community partnership property unless it can be clearly identified as belonging to the separate estate of one or the other (Art. 2405). The source and nature of community partnership property was summarized in Succession of Wiener, supra, and it would serve no useful purpose to repeat that summarization here.

I believe in the reality of the wife's interest in the Louisiana marital community, and I believe in the inequity of taxing a decedent's estate with respect to wealth which he never owned. These principles the statute patently ignores.

The law in question clearly violates the principle announced in Hoeper v. Tax Commission, 284 U. S. 206,215 that "any attempt * * * to measure the tax of one person's property * * * by reference to the property * * * of another is contrary to due process of law."

In Heiner v. Donnan, 285 U. S. 312, 326, 327, the court said: "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols v. Coolidge, 274 U. S. 531, 542; Brushaber v. Union Pac. R. Co., 240 U. S. 1, 24–25; Tyler v. United States, 281 U. S. 497, 504." And then after discussing the Hoeper case the court said:

"In substance and effect, the situation presented in the Hoeper case is the same as that presented here. * * *. *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a
24 denial of due process of law. *Such an action is not taxation but spoilation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' United States v. Railroad Co., 17 Wall. 322, 326." [Italics supplied.]

The statute cannot be supported on the basis that economic benefits were shifted by death. It is quite true that there is frequently a shift in management at the husband's death, but the rights held by the wife when contrasted to the restrictions and circumscribed agency powers of the husband do not lend support to the view that the husband's death confers a real or substantial economic benefit on the wife with respect to the one-half interest in the partnership property, which she has always owned. A shift of bare management powers is not a shift in economic interests and cannot be made the subject of the tax. That the tax must be measured by the shifting of real economic benefits as distinguished by mere agency or trust powers is shown by the decision of Reinecke v. Northern Trust Company, 278 U. S. 339, 346–347; Poe v. Seaborn, 282 U. S. 101, 113. But, be this as it may, the statute is not limited in its application to the case where the husband died first. The language compels its equal application where the husband is the survivor. It expressly provides that there shall be included in the taxable estate of the decedent "the interest therein held as community property by the decedent and the surviving spouse." The decedent may well be the wife and the surviving spouse the husband. In such case it is not believed that any one familiar with Louisiana law would have the temerity to urge that the husband had acquired any right by his wife's death. Yet the statute operates equally in the assumed case as under the facts here involved.

On settled principles and from the authorities it is clear that if the statute be invalid in the case of the predecease of the wife it is equally invalid in the case where it is the husband who died first. United States v. Reese, 92 U. S. 214, 221; Poindexter v. Greenhow, 114 U. S. 270, 304–305; Howard v. I. C. R. Co., 207 U. S. 463, 501; Butts v. M. & M. Transportation Co., 230 U. S. 126, 134; Bowman v. Continental Oil Co., 256 U. S. 642, 648; 11 Am. Jur., Constitutional Law, Secs. 152, 155, 160, pages 834, 837, 842–845, 854–855.

25 The committee reports show that section 402 (b) (2) was enacted upon the theory that its constitutionality was assured under the cases of Tyler v. United States, supra, and United States v. Jacobs, 306 U. S. 363. But these cases do not support the amendment. Technically many grounds exist for distinguishing the issue involved in the common law devices of concurrent ownership from the problem of community property. In tenancy by the entirety and joint tenancy, neither party has the power of testamentary disposition before the death of the other. In both instances the doctrine of survivorship is the predominant and distinguishing feature, the interest of the decedent automatically vesting in the survivor.[1] Under the community property system each spouse has the full power of testamentary disposition over one-half of the community property at all times and the surviving spouse obtains the decedent's share of the community in full ownership only in case there are no ascendants or descendants.

Tenancy by the entirety and joint tenancy are created only by a private conveyance or devise and are disfavored in most common law states in preference to tenancy in common. In Louisiana the marriage of the parties automatically superinduces the community property system unless there is stipulation to the contrary, and all property, real and personal, acquired during the marriage is presumed to fall into the community. In the Tyler and Jacobs cases death became the generating source of important and definite accessions to the survivor's property rights and all the property came mediately or immediately to the tenancy as a pure gift from the decedent. In Louisiana the wife's interest does not proceed from a gratuity nor does the death of a community partnership spouse generate added property rights in the survivor's one-half of the property.

In the Tyler case the statute expressly included such estates but also expressly excepted "such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent." And as to the estate held to be taxable it is said: "None of the property constituting it had, prior to its

[1] 14 Am. Jur., Cotenancy, Secs. 6, 7, 8, 12, 15, 86.

creation, ever belonged to the surviving spouse." This was a just basis for the decision. But neither the Tyler case nor the Jacobs case has the remotest application to community partnership property.

26 In view of the foregoing the court deems it unnecessary to pass on the remaining constitutional questions raised by plaintiffs.

Findings of fact

The court finds as the facts the allegations of fact contained in the complaint, to the extent that they were admitted by the defendant's answer, and the additional facts contained in the written stipulation on file. These are incorporated herein by reference.

Conclusions of law

1. Section 402 (b) and Section 404 (a) of the Revenue Act of 1942 are unconstitutional and void, being in conflict with the requirements as to due process contained in the 5th Amendment to the Constitution of the United States.

2. Plaintiffs are entitled to recover from the defendant the aforesaid sum of $162,329.59 with interest at the rate of six percent per annum from August 10, 1944 until paid.

The clerk is directed to enter judgment accordingly.

(Sgd.) WAYNE G. BORAH,
United States District Judge.

NEW ORLEANS, LOUISIANA, *March 31st, 1945.*

27 In United States District Court, Eastern District of Louisiana, New Orleans Division

No. 956, Civil Action

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE

Judgment

Filed March 31, 1945

This cause having come on regularly for trial before the court without a jury, and having been submitted for decision and judgment on the pleadings and agreed statement of facts filed therein,

and the court having hear the arguments of the attorneys for the respective parties and having duly considered said pleadings and agreed statement of facts, it is now, for the written reasons on file.

Ordered, adjudged, and decreed that the plaintiffs do have and recover of and from the defendant the sum of One Hundred Sixty-two Thousand Three Hundred Twenty-nine and 59/100 ($162,329.59) Dollars, with interest thereon from August 10, 1944, at the rate of six percent (6%) per annum, until paid.

NEW ORLEANS, LOUISIANA, *March 31st, 1945.*

28 In United States District Court

Petition for appeal

Filed March 31, 1945

To the District Court of the United States, Eastern District of Louisiana, New Orleans Division:

Joachim O. Fernandez, United States Collector of Internal Revenue, does hereby appeal from the judgment made and entered in this cause on March 31, 1945, to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and petitions that this appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings, and papers upon which said judgment is based, duly authenticated, may be transmitted to the Supreme Court of the United States at Washington, D. C. A statement of jurisdiction is presented herewith.

Dated at New Orleans, Louisiana, this 31st day of March 1945.

(Signed) HERBERT W. CHRISTENBERRY,
United States Attorney,
Eastern District of Louisiana,
New Orleans Division.

29 In United States District Court

Order allowing appeal

Filed March 31, 1945

Petition and motion of Joachim O. Fernandez, United States Collector of Internal Revenue, for appeal from the final judgment and order of this Court is hereby granted and the said appeal is hereby allowed.

It is further ordered that a certified transcript of the record, proceedings, and papers be transmitted to the Supreme Court of the United States at Washington, D. C.

Dated at New Orleans, Louisiana, this 31st day of March 1945.

(Signed) WAYNE G. BORAH,
United States District Judge.

[Citation in usual form showing service on Charles E. Dunbar, filed April 5, 1945, omitted in printing.]

46 In United States District Court

[Title omitted.]

Assignment of errors

Filed March 31, 1945

Joachim O. Fernandez, United States Collector of Internal Revenue, assigns the following errors:

1. The Court erred in granting judgment for plaintiffs.
2. The Court erred in failing to hold valid and constitutional the provisions of Section 811 (3) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, requiring the inclusion in the taxable estate of Sam Wiener, Jr., deceased, of the entire value of the community property held by decedent and his surviving spouse.
3. The Court erred in holding that the provisions of Section 811 (3) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942 violated the due process clause of the Fifth Amendment to the Constitution.
4. The Court erred in failing to hold valid and constitutional the provisions of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942, requiring the inclusion in the taxable estate of Sam Wiener, Jr., deceased, of the entire proceeds of life insurance policies on decedent's life, payable to beneficiaries other than the estate.

47 5. The Court erred in holding that the provisions of Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942, violated the due process claim of the Fifth Amendment to the Constitution.

(S) HERBERT W. CHRISTENBERRY,
United States Attorney,
Eastern District of Louisiana,
New Orleans Division.

48 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed March 31, 1945

To the Clerk, United States District Court, Eastern District of Louisiana, New Orleans Division:

The appellant hereby requests that, in preparing the transcript of the record in the above-entitled cause for his appeal to the Supreme Court of the United States, you include the following:

1. Docket entries.
2. Complaint.
3. Answer.
4. Stipulation.
5. Opinion of this Court.
6. Judgment.
7. Petition for appeal, showing the date of filing thereof.
8. Assignment of errors.
9. Order allowing appeal.
10. Jurisdictional statement.
11. Praecipe for transcript of record.

49 12. Proof of service on appellees of petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction and statement to appellees directing their attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

13. Statement to appellees directing their attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

Filed at New Orleans, Louisiana, this 31st day of March 1945.

(S) HERBERT W. CHRISTENBERRY,
United States Attorney,
Eastern District of Louisiana,
New Orleans Division.

51 [Clerk's certificate to foregoing transcript omitted in printing.]

52 In the Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

Filed April 20, 1945

Pursuant to Rule 13, paragraph 9, of the Revised Rules of this Court, appellant states that he intends to rely upon all of the points in his assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service acknowledged this 17th day of April 1945, and appellees hereby consent to the designation of record made above by appellant.

CHAS. E. DUNBAR,
Attorney for Appellees.

[File endorsement omitted.]

53 Supreme Court of the United States

Order noting probable jurisdiction

May 7, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] Enter the Attorney General. File No. 49611. Eastern Louisiana, D. C. U. S. Term No. 1158. Joachim O. Fernandez, United States Collector of Internal Revenue, Appellant vs. Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener. Filed April 13, 1945. Term No. 1158 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 1158 58

In the Supreme Court of the United States

October Term, 1944

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

STATEMENT AS TO JURISDICTION

STATEMENT AS TO JURISDICTION

(Number and Title Omitted)

Filed: March 31, 1945

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, amended March 25, 1940, October 21, 1940, May 26, 1940, April 6, 1942 the appellant submits herewith his statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal in this case.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment here complained of is conferred by Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751.

B. The statutes of the United States, the validity of which are involved herein, are Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, and Section 811 (g) of the Internal Revenue Code, as amended by Section 404 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798. Sections 811 (e) and (g) prior to the amendments and the amendments in question are as follows:

> Internal Revenue Code:
>
> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the

value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(e) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other

person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(g) *Proceeds of Life Insurance.*—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

(26 U. S. C. 1940 ed., Sec. 811),

Revenue Act of 1942, c. 619, 56 Stat. 798:
SEC. 402. COMMUNITY INTERESTS.

* * * * *

(b) *General Rule.*—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof
"(e) *Joint and Community Interests.*—
"(1) *Joint Interests.*—".

(2) By inserting at the end thereof the following new paragraph:

"(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or

any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * * *

SEC. 404. PROCEEDS OF LIFE INSURANCE.

(a) *General Rule.*—Section 811 (g) (relating to life insurance) is amended to read as follows:

"(g) *Proceeds of Life Insurance.*—

* * * * *

"(2) *Receivable by Other Beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by as-

signment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

* * * * *

"(4) *Community Property.*—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

(26 U. S. C. 1940 ed., Supp. III, Sec. 811)

C. The judgment of the District Court sought

to be reviewed was entered on the 31st day of March, 1945. The petition for appeal was filed on the 31st day of March, 1945, and was presented to the District Court herewith, to wit, on the 31st day of March, 1945.

This suit was brought to recover federal estate taxes, together with interest, paid by plaintiffs as heirs of Sam Wiener, Jr., deceased, who died December 10, 1942.

A timely claim for refund was filed and upon its rejection suit seasonably brought in the District Court. The question presented is whether all or only one-half of the value of the community property, and all or only one-half of the proceeds of life insurance policies on decedent's life, premiums for which were paid from community funds of the decedent and his wife, should be included in decedent's taxable estate. The exclusion provisions of the statute are not in issue.

The entire value of the community property, including all of the proceeds of the life insurance here involved, is includible in the decedent's taxable estate under the provisions of Section 811 (e) and (g) of the Internal Revenue Code, as amended by Sections 402 (b) and 404 (a) of the Revenue Act of 1942. The District Court held the relevant statutes unconstitutional. The District Court decided that the amendments to Section 811 (e) and (g) of the Internal Revenue Code made by Sections 402 (b) and 404 (a) of the

Revenue Act of 1942, violated the due clause process of the Fifth Amendment to the Constitution.

There are eight states in which the community property system is in force and the amendments to Section 811 (e) and (g) of the Internal Revenue Code, made by Sections 402 (b) and 404 (a) of the Revenue Act of 1942, will affect the tax liability of a large number of decedents' estates. The matter of having the issue of the constitutionality of these provisions determined is consequently of great importance in the administration of the taxing statutes.

It is believed that the following decisions sustain the Court's jurisdiction: *O'Malley v. Woodrough*, 307 U. S 277; *United States* v. *Rock Royal co-op.*, 307 U. S. 533; *United States* v. *Johnson*, 319 U. S. 302; and *Bowles* v. *Willingham*, 321 U. S. 503.

A copy of the District Court's opinion is attached hereto.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

(Signed) HERBERT W. CHRISTENBERRY,
United States Attorney.

United States District Court, Eastern District of Louisiana, New Orleans Division

No. 956—Civil Action

SAMUEL G. WIENER, WILLIAM B. WIENER, JACQUES L. WIENER

vs.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE

Filed: March 31, 1945

Herold, Cousin and Herold (Sidney L. Herold), Phelps, Dunbar, Marks and Claverie (Charles E. Dunbar), Attorneys for Plaintiffs.

Samuel O. Clark, Jr., Assistant Attorney General, Andrew D. Sharpe, Helen R. Carloss, James P. Garland, Special Assistants to the Attorney General. Herbert W. Christenberry, United States Attorney, Attorneys for Defendant.

R. N. Gresham, Palmer Hutcheson, J. P. Jackson, Harry C. Weeks, Amici Curiae.

BORAH, *District Judge.*

This action was filed by the universal legatees and heirs of Sam Wiener, Jr., deceased, to recover an alleged overpayment of Federal Estate taxes in the amount of $162,329.59, with interest. The case was tried by the court without

a jury on an agreed statement of facts. The stipulated facts, incorporated herein by reference, reveal the following:

Plaintiffs are the sons of Sam Wiener, Jr., who died on December 10, 1942 in Shreveport, Louisiana, leaving a last will and testament in which he constituted the present plaintiffs his sole heirs. Decedent was married in Shreveport, Louisiana, in the year 1907 to Florence Loeb with whom he lived from that time until his death.

"During the marriage, Sam Wiener, Jr., was engaged in many different kinds of business, such as the grocery business, lumber business, real estate and later, in investments of various character. All assets of every character, movable and immovable, which stood of record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside the household, nor did she receive from any one salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener."

In the Federal Estate Tax Return filed on behalf of the estate of Sam Wiener, Jr., deceased, plaintiffs reported the entire value of all of the

separate property owned by decedent, plus the one-half of the net value of the community which had existed between decedent and his surviving wife. Included in said community, and therefore reported only to the extent of one-half thereof, were fifteen policies of life insurance contracted for by decedent during the said marriage, all naming the wife as beneficiary, and each and all of the premiums on which had been paid with community funds. Each of said policies reserved the right to the insured of changing the beneficiary.

Under the return as filed there was an estate tax liability of $107,078.47 and this sum was paid.

In the audit of the Federal Estate Tax Return the Commissioner of Internal Revenue assessed a deficiency of federal estate taxes of $165,821.57, which together with interest in the amount of $3,807.08 was paid by plaintiffs to defendant herein on August 10, 1944. The additional assessment resulted in part from the inclusion by the Commissioner of Internal Revenue in decedent's taxable estate of the entire value of all of the community property of every character and the inclusion in the taxable estate of the total proceeds of the life insurance above referred to.

Claim for refund of the amount sued for herein was filed by plaintiffs on August 12, 1944 and said claim was rejected in its entirety by the Commissioner of Internal Revenue on October 31, 1944.

"There exists no controversy between the parties respecting valuations. The amount claimed by the plaintiffs in their claim for refund, and which forms the subject matter of this suit, represents that part of the deficiency assessment resulting entirely from the application by the Bureau of Internal Revenue of the provisions of Section 402 (b) (2) and of Section 404 (a) of the Federal Revenue Act of 1942; that is to say, in the inclusion by the Bureau of Internal Revenue in the taxable estate of the decedent the entire community property (rather than only one-half thereof as returned), including the entire proceeds of the life insurance above referred to."

Section 811, subsections (e) and (g) of the Internal Revenue Code, the applicable statute, was amended by Sections 402 (b) (2) and 404 (a), respectively, of the Revenue Act of 1942. This case presents the question of the constitutional validity of Sections 402 (b) (2) and 404 (a). For convenience of discussion I shall hereinafter refer only to Section 404 (b) (2) as the constitutional questions raised by plaintiffs in respect to this amending section apply with equal force to Section 404 (a).

Section 402 (b) (2) of the Revenue Act of 1942 provides that there shall be included in a decedent's gross estate the full value of all property—

> to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State,

> Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

By its express terms this statute provides that all property held by a decedent and spouse in community shall be included in the gross estate of the decedent, except that portion shown to have been received as compensation for personal services actually rendered by the survivor, or derived from such compensation, or from the separate property of the survivor, but in no case shall such interest included in the gross estate be less than the share over which the decedent had a testamentary power of disposition.

The community property with which we are concerned in the instant case is of the type which does not fall within either exception in the statute. We have therefore a type of community property in which the first spouse to die is taxed on the whole, including the survivor's share.

The fact that section 402 (b) (2) allows all property which can be shown to have been received for personal services actually rendered or

derived originally from such compensation or from separate property of the surviving spouse does not operate in aid of its validity in Louisiana. All income of the husband is presumed under the law of this state to be community property. (Civil Code Art. 2405.) Furthermore "compensation for personal services actually rendered" falls into the community (Article 2402) regardless of whether such service be rendered by the husband or by the wife living together as such. To charge the heirs with the burden of showing what part of the community consisted of the survivor's separate earnings or separate property would not only be impracticable but would have the effect of denying one of the most important principles of the community property system, the theory that the gains of the community automatically vest in the husband and wife equally, each having full ownership of one-half of such gains. (Arts. 2402, 2406.) Moreover, section 402 (b) (2) itself denies this allowance by providing that in no case may the gross estate be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Thus the statute first states, in effect, that community property, for taxation purposes, will be regarded as the separate property of each spouse to the extent that it was earned by that spouse, then suddenly announces a recognition of the surviving spouse's half interest in the com-

munity, regardless of its source by providing that the estate of the spouse dying first is taxable to the extent of at least one-half the community in all instances.

The Federal estate tax is not a tax on property, but on the transmission of property from the dead to the living. *United States* v. *Perkins,* 163 U. S. 625; *Plummer* v. *Coier,* 178 U. S. 115. This statute abolishes completely as to community partnership property only the test of ownership at death as being the controlling factor in measuring the tax, and substitutes therefor, as to the bulk of such property, the conception of dual, but complete, ownership by both spouses, so that this bulk is taxed as a part of the gross estate on the first to die, depending not on source, actual ownership or management, but upon the accidental circumstance of which spouse predeceases the other. As to that property received or derived from compensation for personal services actually rendered or traceable to income from separate property, the source controls only in the event the first to die received the compensation or owned the separate property, and all such property must be included in such recipient's gross estate. If the first to die did not receive the compensation or the derivatives from separate property, source is completely disregarded, and one-half is included in the gross estate of such decedent. Power of testamentary disposition limits the amount to be

included in the gross estate, so it can not in any case be less than the amount over which the decedent had power of testamentary disposition and thus in certain events a third and different rule of taxation is applied.

"The nature and character of the right of the wife in the community for the purpose of taxation (is) peculiarly a local question" and determination of the state court thereto is not reviewable by the Supreme Court. *Moffitt v. Kelly*, 218 U. S. 400, 406; *Lang* v. *Commissioner*, 304 U. S. 264. As was said in *United States* v. *Goodyear*, 99 F. (2d) 523, 526, "the present rule seems to be that community property law is applicable in determining the amount of the gross estate" for federal estates tax purposes. "Every marriage contracted in this state, superinduces of right partnership or community of acquets or gains if there be no stipulation to the contrary." (Article 2399), and it is the settled law of Louisiana "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired." *Succession of Wiener*, 203 La. 649, 657, 14 So. (2d) 475.

"In Louisiana the wife has a present vested interest in community property equal to that of her husband." *Bender* v. *Pfaff*, 282 U. S. 127, 132. "The wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are

entitled to equal dignity." *Succession of Wiener, supra*, at page 666. The rights of the wife as well as those of the husband in and to the marital gains grow out of the marriage contract itself and do not originate only when it is dissolved. She is the half partner and owner of all acquisitions made during the existence of the community whether they be property or income. She is afforded the same privilege as her husband of disposing of her interest therein by will, and in the absence of a will, at her death her interest in the community property passes to her legal heirs in the same manner as her husband's interest therein passes to his legal heirs, in the absence of a will.

The Louisiana Code speaks of the community always as a partnership, the husband being its manager. The husband is the managing partner of the partnership but his powers of management are restricted and circumscribed. His management of the wife's interest in the property terminates upon separation, upon divorce, upon a showing of fraud, or whenever the husband proves to be incompetent, a bad manager, of a reckless and speculative disposition or whenever his affairs are in such disorder that her property rights are jeopardized. Under the statutes of Louisiana the wife can by ante-nuptial agreement with her husband stipulate that there shall be no community, or by agreement make herself rather than him the managing partner, or agree that the community

partnership shall be managed jointly by husband and wife or vary the partnership agreement in any other way they see fit. Failure to exercise such option carries with it the conclusive presumption that they had elected that future acquisitions should be under the regime of the ordinary community which "consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife and of the estate which they may acquire during the marriage," etc. (Article 2402). Accordingly all property found in the possession of either spouse upon dissolution of the community is presumed to be community partnership property unless it can be clearly identified as belonging to the separate estate of one or the other. (Art. 2405). The source and nature of community partnership property was summarized in *Succession of Wiener*, supra, and it would serve no useful purpose to repeat that summarization here.

I believe in the reality of the wife's interest in the Louisiana marital community, and I believe in the inequity of taxing a decedent's estate with respect to wealth which he never owned. These principles the statute patently ignores.

The law in question clearly violates the principle announced in *Hoeper* v. *Tax Commission*, 284 U. S. 206, 215 that "any attempt * * * to

measure the tax of one person's property * * * by reference to the property * * * of another is contrary to due process of law."

In *Heiner* v. *Donnan*, 285 U. S. 312, 326, 327, the court said: "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24–25; *Tyler* v. *United States*, 281 U. S. 497, 504." And then after discussing the Hoeper case the court said:

> In substance and effect, the situation presented in the Hoeper case is the same as that presented here. * * * *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related; and from which the estate derived no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of due process of law. *Such an exaction is not taxation* but spoliation. "It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his

own gains and of his own property. *United States* v. *Railroad Co.*, 17 Wall. 322, 326. [Italics supplied.]

The statute cannot be supported on the basis that economic benefits were shifted by death. It is quite true that there is frequently a shift in management at the husband's death, but the rights held by the wife when contrasted to the restrictions and circumscribed agency powers of the husband do not lend support to the view that the husband's death confers a real or substantial economic benefit on the wife with respect to the one-half interest in the partnership property, which she has always owned. A shift of bare management powers is not a shift in economic interest and cannot be made the subject of the tax. That the tax must be measured by the shifting of real economic benefits as distinguished by mere agency or trust powers is shown by the decision of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346–347; *Poe* v. *Seaborn*, 282 U. S. 101, 113. But, be this as it may, the statute is not limited in its application to the case where the husband died first. The language compels its equal application where the husband is the survivor. It expressly provides that there shall be included in the taxable estate of the decedent "the interest therein held as community property by the decedent and the surviving spouse." The decedent may well be the wife and the surviving

spouse the husband. In such case it is not believed that any one familiar with Louisiana law would have the temerity to urge that the husband had acquired any right by his wife's death. Yet the statute operates equally in the assumed case as under the facts here involved. On settled principles and from the authorities it is clear that if the statute be invalid in the case of the predecease of the wife it is equally invalid in the case where it is the husband who died first. *United States* v. *Reese*, 92 U. S. 214, 221; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304–305; *Howard* v. *I. C. R. Co.*, 207 U. S. 463, 501; *Butts* v. *M. & M. Transportation Co.*, 230 U. S. 126, 134; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 648; 11 Am. Jur., Constitutional Law, Secs. 152, 155, 160, pages 834, 837, 842–845, 854–855.

The committee reports show that section 402 (b) (2) was enacted upon the theory that its constitutionality was assured under the cases of *Tyler* v. *United States* supra, and *United States* v. *Jacobs*, 306 U. S. 363. But these cases do not support the amendment. Technically many grounds exist for distinguishing the issue involved in the common law devices of concurrent ownership from the problem of community property. In tenancy by the entirety and joint tenancy, neither party has the power of testamentary disposition before the death of the other. In both instances the doctrine of survivorship is the pre-

dominant and distinguishing feature, the interest of the decedent automatically vesting in the survivor.[1] Under the community property system each spouse has the full power of testamentary disposition over one-half of the community property at all times and the surviving spouse obtains the decedent's share of the community in full ownership only in case there are no ascendents or descendants.

Tenancy by the entirety and joint tenancy are created only by a private conveyance or devise and are disfavored in most common law states in preference to tenancy in common. In Louisiana the marriage of the parties automatically superinduces the community property system unless there is stipulation to the contrary, and all property, real and personal, acquired during the marriage is presumed to fall into the community. In the Tyler and Jacobs cases death became the generating source of important and definite accession to the survivor's property rights and all the property came mediately or immediately to the tenancy as a pure gift from the decedent. In Louisana the wife's interest does not proceed from a gratuity nor does the death of a community partnership spouse generate added property rights in the survivor's one-half of the property.

[1] 14 Am. Jur., Cotenancy, Secs. 6, 7, 8, 12, 15, 86.

In the Tyler case the statute expressly included such estates but also expressly excepted "such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent." And as to the estate held to be taxable it is said: "None of the property constituting it had, prior to its creation, ever belonged to the surviving spouse." This was a just basis for the decision. But neither the Tyler case nor the Jacobs case has the remotest application to community partnership property.

In view of the foregoing the court deems it unnecessary to pass on the remaining constitutional question raised by plaintiffs.

FINDINGS OF FACT

The court finds as the facts the allegations of fact contained in the complaint, to the extent that they were admitted by the defendant's answer, and the additional facts contained in the written stipulation on file. These are incorporated herein by reference.

CONCLUSIONS OF LAW

1. Section 402 (b) and Section 404 (a) of the Revenue Act of 1942 are unconstitutional and void, being in conflict with the requirements as to due process contained in the 5th Amendment to the Constitution of the United States.

Plaintiffs are entitled to recover from the defendant the aforesaid sum of $162,329.59 with in-

terest at the rate of six percent per annum from August 10, 1944 until paid.

The clerk is directed to enter judgment accordingly.

(Signed) WAYNE G. BORAH,
United States District Judge.

NEW ORLEANS, LOUISIANA, *March 31st, 1945.*

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1945

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE APPELLANT

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OPINION BELOW

The only previous opinion in this case is that of the District Court (R. 12–19) which is reported in 60 F. Supp. 169.

JURISDICTION

The judgment of the District Court was entered on March 31, 1945, and the petition for appeal was filed and allowed by the District Court on the same date. (R. 19–21.) Probable jurisdic-

tion by this Court was noted on May 7, 1945. (R. 23.) The jurisdiction of this Court rests upon Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751.

QUESTION PRESENTED

Whether Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 are unconstitutional.

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES INVOLVED

The constitutional provisions, federal statutes, and Treasury Regulations involved are set forth in Appendix A, *infra*, pp. 70–79. Excerpts from the relevant committee reports are set forth in Appendix B, *infra*, pp. 80–84.

Provisions of the Louisiana Civil Code relating to community property are set forth in Appendix C, *infra*, pp. 85–97.

STATEMENT

This is an action for the recovery of an alleged overpayment of federal estate taxes upon the estate of Sam Wiener, Jr. The facts were stipulated (R. 7–11), and were so found by the District Court (R. 12, 19). They may be summarized as follows:

The decedent was married in Shreveport, Louisiana, in 1907, to Florence Loeb, with whom he lived from that time until his death on December 10, 1942. The appellees are his children and sole heirs. (R. 7–8.) During the marriage the

decedent engaged in many different kinds of businesses, such as the grocery business, lumber business, real estate, and investments of various kinds. With the exception of certain realty in Mississippi, all assets which stood of record or in possession of the decedent at the time of his death were acquired by and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside of the household, nor did she receive from anyone salary or other compensation for personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener. (R. 8.)

In the federal estate tax return there was reported only one-half of the net value of the community property. Included in the community and also reported to the extent of only one-half, were 15 policies of life insurance, all of which (a) were contracted for by decedent during the marriage; (b) named the wife as beneficiary, and (c) reserved the right to the insured of changing the beneficiary. All of the premiums on these policies had been paid for with community funds. (R. 8-9.)

The Commissioner of Internal Revenue determined a deficiency in estate tax on the ground that there should have been included in the gross

estate the entire value of all of the community property, including the total proceeds of the 15 life insurance policies. The deficiency was paid and following rejection of a claim for refund this action against the Collector was instituted. (R. 9–10.)

It is agreed that if it should be held that only half of the community property is taxable, the deductions should be adjusted so as to eliminate half of the community debts and expenses. (R. 10.)

The District Court held that the amendments made to Section 811 of the Internal Revenue Code by Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 are unconstitutional (R. 12–19) and entered judgment for the plaintiffs (R. 19–20).

SPECIFICATION OF ERRORS TO BE URGED

The assignments of error appear at R. 21. They may be summarized by the statement that the court below erred in holding that Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 are unconstitutional.

SUMMARY OF ARGUMENT

A. The statutory provisions here involved were enacted for the sole purposes of stopping a serious leak in the revenues and of eliminating an unfair discrimination in the practical operation of the estate tax. They are directed toward the solution of a federal tax problem, one which is clearly within the power of Congress to resolve.

B. The statute does not offend the Fifth Amendment. That provision of the Constitution operates as a limitation upon the taxing power only in the most exceptional circumstances, and then only where the statute is so completely arbitrary and capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. Congress can hardly be charged with having acted here out of caprice. However the interest of the decedent's wife in the community property prior to his death may be characterized, whether she be said to have had a "vested interest" in half, or to have been at all times the "owner" of half, the fact remains that upon his death her rights and powers with respect to that half were materially enlarged. An analysis of the local law with respect to the relative rights of the parties prior to the husband's death, makes clear that there was at that time a distinct shift to her of substantial rights and powers in the half which she is said to have always "owned".

It is not necessary to mark the outer limits of the Congressional power with respect to the application of the estate tax, for it is settled that such a shifting of economic interest as followed here from the death of the husband, constitutes ample justification for the inclusion in his gross estate of that half of the community property which went to his wife. *Whitney* v. *Tax Commission,* 309 U. S. 530, 539. It is not material

that under the local law the wife's interest is not regarded as passing to her by descent, for similar interests, which likewise are not regarded by the local law as passing by descent, have long been subject to the tax. The dower and courtesy interests, or any modern statutory substitutes therefor, of a surviving spouse are apt examples. There, as in the case of community property, the interest of the surviving spouse is usually deemed to have been "vested" as a result of the marriage and not to have been the subject of a transfer from the decedent to the survivor. Likewise the pre-existing interest of a surviving joint tenant or tenant by the entirety is includible in the gross estate of the deceased tenant, although that interest is not regarded by the local law as passing by descent. In all of these instances it has been held that there is no constitutional objection to the statute. *Tyler* v. *United States*, 281 U. S. 497; *United States* v. *Jacobs*, 306 U. S. 363. It was enough that death was the occasion for the shifting of substantial rights and powers with respect to those interests. That is also true here. Congress cannot therefore be said to have overstepped the bounds of reason in concluding that the changes in the wife's interest which followed the death of the decedent here are sufficiently similar to those which have long been the occasion for the tax to require, in the interests of uniform and equitable operation, that this situation be accorded similar treatment.

Indeed, this Court has already held that the shifting of economic interest resulting from the death of a spouse in a community property state furnishes ample occasion for the imposition of a death duty by a state and that such a tax does not violate the Fourteenth Amendment. *Moffitt v. Kelly,* 218 U. S. 400. *A fortiori* such a tax by the Federal Government does not violate the Fifth Amendment since the restraints imposed by that amendment upon the federal taxing power are not as great as those imposed upon the states by the Fourteenth. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584.

Any suggestion that the statute might be unconstitutional as applied to a case in which the wife predeceases the husband, is not properly before the Court because this is not such a case, but in any event it is plain that there is no greater constitutional objection to the operation of the statute in such cases than in the case in which the husband predeceases the wife.

There is no merit to the suggestion that it is not possible to show what portion of the community property is economically attributable to the surviving spouse and that the statute therefore creates an irrebuttable presumption that the whole estate was created by the spouse first to die. The burden is no different from that of showing what part of the property is separate as distinguished from community property or of showing what portion of the co-owned property was contributed

by the surviving spouse in the case of joint tenancies and tenancies by the entirety. Certainly, it cannot be assumed that the statute imposes an impossible burden. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

C. The statute does not violate the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution. That provision does not require that a tax be intrinsically equal in its operation throughout all of the states. It imposes a requirement merely of geographic uniformity. That test is obviously met by the statutory provisions here involved for they apply to community property interests wherever they may be found. There is no substantial basis for the suggestion that the community property states will be at a disadvantage with respect to the operation of the estate tax in comparison with the other states of the union. However, even if it should be assumed that such a disadvantage will ensue, that would afford no ground for a holding that the statute is in contravention of the uniformity clause, for such a disadvantage would be the result, not of the federal statute, but of differences in state laws. Cf. *Florida* v. *Mellon,* 273 U. S. 12.

D. The statute does not violate the Tenth Amendment. That amendment does not operate as a limitation against the powers, express or implied, of the National Government. *United States* v. *Darby,* 312 U. S. 100, 123–124. There has been no deliberate intrusion by Congress into a sphere

reserved for the states, or even an unintentional interference with the power of the states to regulate marital property rights. The statute does not undertake to alter the rights of husband and wife in the community property states nor does it proceed from a disregard of the existence of those rights. On the contrary the statute represents a confirmation of the power of the states to regulate marital property rights and of the rights of the spouses as the state has distributed them. It proceeds not from a disregard of those rights but from a regard of them, for the tax has been levied in recognition of the fact that they exist as the state has ordained. The intimation that the statute will necessarily force the community property states to abandon that system rests upon pure conjecture, and it cannot be assumed that such a result will follow. But even if it should, that would afford no ground for striking down the exercise of the federal power here, since the constitutional powers of the Federal Government are supreme.

ARGUMENT

SECTIONS 402 (b) (2) AND 404 (a) OF THE REVENUE ACT OF 1942 ARE CONSTITUTIONAL

A. SECTIONS 402 (b) (2) AND 404 (a) REPRESENT AN EXERCISE OF THE FEDERAL TAXING POWER IN THE SOLUTION OF A FEDERAL TAX PROBLEM

This case brings to the Court the question of the constitutional validity of the amendments

made to Section 811 of the Internal Revenue Code by Sections 402 (b) (2) and 404 (a) of the Revenue Act of 1942 (Appendix A, *infra*, pp. 72–75). The question with respect to Section 402 (b) (2) was before the Court on review of the decision of the Supreme Court of Louisiana in *Succession of Wiener*, 203 La. 649 (involving the estate of the same decedent as is here involved), which was, however, disposed of on jurisdictional grounds. *Flournoy* v. *Wiener*, 321 U. S. 253.

As so amended the statute provides that for purposes of the estate tax there shall be included in a decedent's gross estate the full value of all property—

> To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Only the first sentence of this subsection is directly involved here. It requires the inclusion in

the gross estate of a decedent of the value of all property held in community except for that portion which represents earnings, or the increment from separate property, of the surviving spouse. The second sentence merely continues the preexisting law by providing that in any case there must be included in the gross estate the value of the property over which the decedent had power of testamentary disposition. In the instant case no part of the community property represented compensation received by the decedent's wife for personal services or the increment from her separate property, and as a consequence the statute requires the inclusion in the decedent's gross estate of the entire community property. It is this application of the section which is here said to be unconstitutional.

Also involved in the instant case are the amendments relating to the proceeds of life insurance made by Section 404 (a) of the Revenue Act of 1942 (Appendix A, *infra*, pp. 73–75). As so amended paragraph (2) of Section 811 (g) of the Internal Revenue Code requires the inclusion in the gross estate of the proceeds of policies of insurance on the decedent's life with respect to which he (a) had paid the premiums, or (b) possessed at the time of his death any of the incidents of ownership. Paragraph (4) provides that where premiums have been paid with community property, they shall be considered to have been paid by the insured except to the extent that

they represent earnings, or the increment from separate property, of the surviving spouse. The latter paragraph also defines the term "incidents of ownership" to include such incidents if possessed by the decedent at his death as manager of the community.

The challenge to the statute has proceeded upon a broad front. It is said to violate the Fifth and Tenth Amendments to the Constitution, to infringe the requirement of Article 1, Section 8, Clause 1, that duties, imposts and excises be uniform, and to impose a direct tax, void because not apportioned, within the meaning of Article 1, Section 2, Clause 3, and Article 1, Section 9, Clause 4 (Appendix A, *infra*).

Since the attack upon the statute is bottomed to a substantial degree upon the assertion that Congress has thereby sought to withdraw from control of the states their power to regulate the property incidents of the marital relationship, we think it important to make clear at the outset the nature of the problem with which Congress dealt and what it sought to achieve by the challenged enactment. The argument attributes to Congress a purpose to alter and regulate local systems of property rights and has even been carried to the point of alleging that what Congress really sought to achieve was to force the community property states to abandon that system.[1]

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[1] See brief of Attorneys General of California, Arizona, Etc., in *Flournoy* v. *Wiener*, 321 U. S. 253, p. 5.

These contentions might well be answered shortly by simple reference to *Sonzinsky* v. *United States,* 300 U. S. 506. In that case the Court said that it was beyond its competency to inquire (pp. 513–514)—

> into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it * * *

and that it—

> will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.

But in any event the record is plain beyond question. Congress dealt only with a purely federal tax problem, a problem with which it has undoubted power to deal, and there is absolutely no basis for the implication of any hidden purpose to achieve some other end.

The history of the application of the estate tax in the community property states has been similar to that of the income tax. In *Poe* v. *Seaborn,* 282 U. S. 101, and its companion cases,[2] it was held as a matter of statutory construction that for purposes of the income tax, spouses in the eight

[2] *Hopkins* v. *Bacon*, 282 U. S. 122; *Bender* v. *Pfaff*, 282 U. S. 127; *Goodell* v. *Koch*, 282 U. S. 118; *United States* v. *Malcolm*, 282 U. S. 792.

traditional community property states[8] could divide the community income between them in separate returns, achieving thereby a reduction in surtaxes. This conclusion was reached upon the ground that only one-half was income "of" each spouse within the meaning of the federal statute which levied the tax upon "the income of every individual". These holdings were regarded as requiring that for purposes of the estate tax only one-half of the community property could be treated as "the extent of the interest" of a decedent in such property within the meaning of what is now Section 811 (a) of the Internal Revenue Code (Appendix A, *infra*, p. 71). 1 Paul, Federal Estate and Gift Taxation, Sec. 1.09, p. 58; cf. *Lang* v. *Commissioner*, 304 U. S. 264.

The result has been the imposition of disproportionate and heavier burdens under both the income tax and the estate tax upon spouses in all of the other states of the Union. Since both of these taxes are progressively graduated in rates so as to distribute the burden in accordance with ability to pay, and should manifestly operate with substantial uniformity throughout the nation (cf. *United States* v. *Pelzer*, 312 U. S. 399, 402), the situation aroused widespread critical

[8] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The cases referred to, however, did not involve New Mexico, Idaho, or Nevada.

discussion.[4] And the matter has been the subject of close Congressional attention for many years and upon many occasions.[5]

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[4] E. g., see the dissenting opinion of Justices Douglas and Black in *Commissioner* v. *Harmon*, 323 U. S. 44, 49, and those by Haney, J., in *Black* v. *Commissioner*, 114 F. 2d 355, 360 (C. C. A. 9th), and *Commissioner* v. *Cadwallader*, 127 F. 2d 547, 550 (C. C. A. 9th). Paul, Studies in Federal Taxation (Second Series) 40–43; 1 Paul, Federal Estate and Gift Taxation, Sec. 1.09; Bruton, The Taxation of Family Income, 41 Yale L. J. 1172 (1932); Altman, Community Property: Avoiding Avoidance by Adoption in the Revenue Act, 16 Tax Magazine 138 (1938); Oliver, Community Property and the Taxation of Family Income, 20 Tex. L. Rev. 532 (1942); Lowndes, Community Income and Alimony, 20 Tax Magazine 3 (1942); Ray, Proposed Changes in Federal Taxation of Community Property, 30 Calif. L. Rev. 397, 527 (1942); Altman, Oklahoma Community Property Law, 22 Tax Magazine 260 (1944); Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799, 827 (1943).

See also the material collected in fn. 5, *infra*.

[5] 1921: See H. Rep. No. 350, 67th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 168, 176); H. Conference Rep. No. 486, 67th Cong., 1st Sess., p. 21 (1939–1 Cum. Bull. (Part 2) 206, 212); 61 Cong. Record, Part 6, pp. 5909, 5922; Part 7, p. 7229.

1924: Revenue Revision 1924, Hearings before the Committee on Ways and Means, 68th Cong., 1st Sess., pp. 194–197, 348–387, 478–485.

1933: Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. II, Part 2 (1933), pp. 15, 118–121, 139–140, 169.

1934: Hearings before a Subcommittee of the Committee on Ways and Means on H. R. 8396, 73d Cong., 2d Sess.; H. Rep. No. 704, Part 2, 73d Cong., 2d Sess., pp. 8–10.

1937: President's letter to Congress of June 1, 1937 (Hearings Before the Joint Committee on Tax Evasion and Avoid-

This was the chronic problem which Congress finally determined to meet, at least insofar as the estate and gift taxes were concerned.[6] The House Committee Report (H. Rep. No. 2333, 77th Cong., 1st Sess., pp. 35–37, 160 (1942–2 Cum. Bull. 372, 401) (Appendix B, *infra*, p. 80), pointed out (p. 35): "For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy preferential treatment over those living in non-community-property States." Tables were set forth in graphic illustration of the "enormous" differences in tax treatment in the typical situation in which the husband dies first, leaving property acquired through his efforts. The report continued (p. 37):

> Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. This follows somewhat the treatment which is accorded to joint estates under the existing law.

ance, 75th Cong., 1st Sess., Part 1, pp. 2, 5; see also, Part 2, p. 311).

1941: S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., p. 9 (1941–2 Cum. Bull. 466, 474).

[6] Sections 402 and 404 of the Revenue Act of 1942 relate to the estate tax and Section 453 deals with the gift tax.

The Senate Report (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231–232) (1942-2 Cum. Bull. 504) (Appendix B, *infra*, p. 83), stated the same purpose as motivating the provision. It said (p. 231):

> This section, which corresponds to section 402 of the bill passed by the House, eliminates special estate tax privileges enjoyed by virtue of the community property system.

The record is clear. Congress exercised its power to tax for no reason other than those germane to problems of taxation. It sought (a) to stop a serious leak in the revenues and (b) by so doing to eliminate an inequity in the operation of the tax. There is no room for the imputation of an invidious purpose[7] to eliminate, by means of a tax, the community property system. As this Court said in *Patton* v. *Brady*, 184 U. S. 608, 620:

> There is in this legislation, if ever such a question could arise, no matter of color or pretence. There was an existing demand, and to meet that demand this statute was enacted.

When shorn of verbiage and technical elaboration the objections to the legislation all reduce to an assertion that the discrimination in favor of

[7] Nor is there any basis for the suggestion that the amendments will necessarily result in the abandonment of that system. See *infra*, pp. 62, 68–69.

the community property states is one which is required by the Constitution. We respectfully submit, however, that the Constituton does not leave Congress helpless to rectify such a situation.[8] Congress has undoubted power to levy an estate tax,[9] and has an equally plain power to eliminate inequities in its practical operation. Congress has considered the statute appropriate in the achievement of an end within its express constitutional authority. It seems that it can hardly be denied that there is a reasonable relationship between the legislation and the end which it is designed to promote. Therefore the Congressional decision that the statute is necessary and proper is not to be reexamined here. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Logan* v. *United States,* 144 U. S. 263; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447, 473–474.

B. THE FIFTH AMENDMENT

1. *The nature of the restraints upon the taxing power under the due process clause*

At the outset it should be pointed out that the presumption in favor of the validity of an Act

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[8] The objections made to the statute have not been confined to an attack upon the particular remedy chosen by Congress but assume a scope which denies to Congress any power to deal with the problem at all. See amicus curiae brief of Brady and others in *Flournoy* v. *Wiener*, pp. 53–54.

[9] *New York Trust Co.* v. *Eisner*, 256 U. S. 345; cf. *Scholey* v. *Rew*, 23 Wall. 331; *Knowlton* v. *Moore*, 178 U. S. 41.

of Congress is particularly strong with respect to revenue acts,[10] *Nicol* v. *Ames,* 173 U. S. 509, 515; *United States* v. *Jacobs,* 306 U. S. 363, 370. It is only in rare and exceptional circumstances that the due process clause of the Fifth Amendment operates as a limitation upon the taxing power (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44), and then only if the challenged statute be so arbitrary or capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90; *Nichols* v. *Coolidge,* 274 U. S. 531.

The contention that the 1942 amendments contravene the due process clause appears to be based primarily upon these premises: (a) It is asserted that under local law the wife was at all times the "owner" of one-half of the community property, and (b) it is contended that to measure the tax upon the husband's estate by that half amounts to taxing A on the property of B, which is said to violate the Fifth Amendment.

With respect to the suggestion that the wife of the decedent herein was at all times the "owner" of half of the community property, it may be conceded that the local law describes her as having a "vested interest" in half of the

[10] This fundamental tenet may well be emphasized since both the court below and the District Court in the companion case of *United States* v. *Rompel,* No. 59, seem to have overlooked it.

property,[11] although it may be noted that the Louisiana courts have not always so held. See *Guice* v. *Lawrence*, 2 La. Ann. 226, which was overruled in *Phillips* v. *Phillips*, 160 La. 813, 826–827; see also *Bender* v. *Pfaff*, 282 U. S. 127. The issue, however, does not turn upon such nomenclature.[12] Nor does it turn upon such a

[11] Professor Daggett has said with respect to the wife's interest in Louisiana that: "the property appears to be vested for taxation purposes only; as neither the wife nor her creditors have any rights in it or against it during the existence of the community," and has characterized (p. 592) "adherence to the theory of the wife's vested interest" as amounting "to little more than lip-service." (Daggett, The Oklahoma Community Property Act, 2 La. L. Rev. 575, 585 (1940).)

See also Daggett, The Community Property System of Louisiana, 149–150.

With respect to the situation in the community property states generally, see 3 Vernier, American Family Laws 234–235:

"In certain isolated instances, as in respect to inheritance and income taxation, whether the wife has a vested interest or only an expectancy may be thought extremely important. But in the ordinary points of contact between the husband and wife and third parties it seems to make little difference. By and large, the husband exercises the rights of ownership. Whether he exercises those rights because he is owner, as in California, or because he is the statutory manager of the community, as in other jurisdictions, seems relatively unimportant. The wife finds herself with a "vested interest" in property which she cannot bind by contract, and which (except in Arizona and Washington) may be taken from her by the husband's separate creditors."

[12] *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110. See Altman, The Community Property Amendment to the Estate Tax Law, 21 Tax Magazine 643 (1943).

vague generality as "A's tax cannot be measured by the property of B", for the validity of that generality depends in each instance upon the content of the word "property" and the relationship to it of A and B.[13] Moreover, to the extent that *Hoeper* v. *Tax Commission*, 284 U. S. 206, supports the principle that A cannot be taxed on B's income (see fn. 13, *supra*), the principle is irrelevant here. That case dealt not with community or co-owned property, but with separate property of the wife; under the law of Wisconsin the wife exercised the same right of management and control with respect to her separate property as if she were single. The decision is no authority for holding that an estate tax may not be levied against A's estate on the basis of the full value of co-owned property if substantial rights and powers respecting the whole property accrue to B on A's death.

[13] See H. Rep. No. 1040, 77th Cong., 1st Sess., p. 20 (1941-2 Cum. Bull. 413):

"These cases conclusively demonstrate that the convenient phrase, 'A may not be taxed on B's' income, is by no means an all-pervasive formula which will assist in the solution of tax problems. On the contrary A may be taxed on B's income if there are sufficient justificatory facts. The inquiry does not cease with a determination that A is being taxed on income which he did not receive, but must be further pursued with a view to discovering whether there are sufficient facts to so justify taxing A. The *Wells*, *Clifford*, *Horst*, *Eubank*; *Hormel*, and *Schaffner* cases are examples of situations in which the Supreme Court has concluded that A could be so taxed."

The power of Congress with respect to the permissible tax base for purposes of estate taxation is not limited to property "owned" by the decedent at the time of his death. There need not be a transfer at death in the technical sense from the decedent to the survivor. Cf., e. g., *United States v. Wells,* 283 U. S. 102; *Helvering v. Bullard,* 303 U. S. 297. It is enough here that the death of the decedent was the occasion for the enlargement of his wife's rights and powers with respect to the half of the community property which is referred to as having been "owned"[14] by her. However her interest in that half may be described, whether she be called "owner" or be said to have had a "vested interest" therein, the fact remains that such changes did occur upon his death and that is sufficient to bring the case well within the scope of the Congressional power.[15]

2. *The wife's interest under Louisiana community property law*

Prior to the husband's death the wife's so-called "vested" right consists chiefly of her right

[14] Ownership "is only a bundle of rights and privileges invested with a single name". *Steward Machine Co. v. Davis,* 301 U. S. 548, 581. "Large concepts like 'property' and 'ownership' call for close analysis, especially when tax legislation is under scrutiny." *Whitney v. Tax Commission,* 309 U. S. 530, 538. See also *Central Hanover Bank Co. v. Kelly,* 319 U. S. 94, 98.

[15] See Ray, Proposed Changes in Federal Taxation of Community Property: Estate and Gift Taxes, 30 Calif. L. Rev. 527, 534–537 (1942).

to receive one-half of any community property in existence at the dissolution of the community by death or by divorce (for whatever cause), subject to community obligations. Articles 2406, 2409–2413 of the Louisiana Civil Code, Appendix C, *infra*, pp. 94–96. This is a right, not in specific property, but in a residue. *Tomme* v. *Tomme*, 174 La. 123; *Kelly* v. *Kelly*, 131 La. 1024. The wife has no right during the existence of the community to enjoy or dispose of her half interest in the community property, and she cannot during the existence of the community, secure any definite part of it for her own unrestricted use and enjoyment.

The husband has the sole management of the property and income. Article 2404, Louisiana Civil Code, Appendix C, *infra*, pp. 93–94. He administers it as he pleases and may expend the funds to gratify any personal desire without liability to account to the wife for his administration. *McCaffrey* v. *Benson*, 40 La. Ann. 10; *Frierson* v. *Frierson*, 164 La. 687. We note that the court below refers to the husband as being merely (R. 16) a "managing partner" of a partnership, and characterizes his powers as being ones of "bare management." However, as applied to the marital relationship in Louisiana, this form of description is inaccurate if the words are understood to connote what they ordinarily mean. There is no prohibition against the use by the

"managing partner" of the funds in his charge for his own benefit; there is no liability for an accounting if he has done so; there is no power to terminate the agency at will; the other partner is under no personal liability for his acts.

The husband may alienate the community property (personal or real) without the wife's consent[16] unless title stands in her name alone, in which case she must consent in writing.[17] She may not, however, even where title to the property stands in her name, alienate it without his consent[18] or sue to recover it without his joinder.[19] Nor may she ordinarily incur any obligations on behalf of the community, even for necessaries unless the husband fails to supply them.[20] *Adams* v. *Golson,* 187 La. 363, 371; *D. H. Holmes Co.* v. *Morris,* 188 La. 431. The community property will be liable for her torts only if committed when she was both authorized to and was carrying on the business of the community, and for this purpose a very narrow view is taken of what con-

[16] Article 2404; see also Article 2334 (Appendix C, *infra*, p. 88); *Young* v. *Arkansas-Louisiana Gas Co.*, 184 La. 460; *Smith* v. *Routon*, 181 So. 684 (La. App.); *Burns* v. *DeBakey*, 186 So. 374 (La. App.).

[17] *Otwell* v. *Vaughan*, 186 La. 911.

[18] *Bywater* v. *Enderle*, 175 La. 1098. See also *Norman Mayer & Co.* v. *Montgomery*, 187 La. 374.

[19] *Howell* v. *Harris*, 18 So. 2d 668 (La. App.).

[20] He is, however, liable, as head and master of the community for her attorney's fees in a suit brought by her for separation from bed and board. *Gosserand* v. *Monteleone*, 159 La. 316; see also *Vicknair* v. *Terracina*, 168 La. 417; *Wilson* v. *Henderson*, 191 So. 602 (La. App.).

stitutes the business of the community. *Adams* v. *Golson, supra; Matulich* v. *Crockett,* 184 So. 748 (La. App.); *Wise* v. *Smith,* 186 So. 857 (La. App.).

The husband's obligations are as broad as his powers. He is alone liable for, and only he can be sued for, the community debts. *Scanlan* v. *Warwick,* 10 La. Ann. 30. And the community debts may be satisfied out of his separate property. *Hellberg* v. *Hyland,* 168 La. 493. The wife, however, is not personally liable for the community debts, and they may not be satisfied out of her separate property. *Succession of Clark,* 27 La. Ann. 269; *Winter* v. *Gani,* 199 So. 600 (La. App.).

The only substantial restriction upon the husband's complete dominion over the community property is in the matter of gifts. Except for the establishment of the children of the marriage, he may not give away community real property or the whole, or a quota, of the personal property (Article 2404). "Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons". *Id.*

The extent of the protection which these provisions accord the wife have been thus summarized in Daggett, The Community Property System of Louisiana (p. 24):

> The property *given away* (citing *Bister* v. *Menge,* 21 La. Ann. 216), may be at-

tacked directly by the wife and relief is not given in an action against the husband or his heirs as is the case when there is a fraudulent disposal.

Since, as we have seen, the husband may give away what he pleases of the movables by a particular title, this limitation, like so many others in the Code dealing with immovables has, particularly with the drift away from land investments, become after all, of rather small importance as a safeguard to the wife.

She is also given a right of action by Article 2404 if the husband has made a fraudulent disposition of the property "on her satisfactorily proving the fraud". However, as in the case of an unauthorized gift by the husband, she may have no relief against the fraud until the dissolution of the community. Daggett, The Community Property System of Louisiana, 25.

This does not mean that the husband's dominion is completely unrestricted. As has been pointed out, the wife has a remedy against his heirs if he deliberately defrauds her, and there are some limitations upon his power to dispose of the property by gift. The enrichment of his separate estate at the expense of the community may also lead to a reimbursement when the community is dissolved (Article 2408, Appendix C, *infra*, p. 95), although reimbursement is not for the funds thus expended but for enhancement in value of the

property (*Munchow* v. *Munchow,* 136 La. 753). Conversely, she may bind the community for necessaries if he fails to provide them, and the community will be liable for her torts if they fall within (whatever may ultimately be determined to constitute) the group of those committed while she was on authorized business of the community.

Several statements made by the Supreme Court of Louisiana in *Flourney* v. *Wiener, supra,* with respect to the relationship of the spouses to the community property seem to be at direct variance with the otherwise unbroken course of decision in that state. The court said (203 La. at 668) that no portion of the community property could be used to pay the separate debts of the husband. It also said that the wife might, without securing a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property, whenever the husband proved to be incompetent, a bad manager, or of a reckless or speculative disposition, or whenever his affairs were in such disorder that her property rights were jeopardized.

Prior to *Flournoy* v. *Wiener,* it seems to have been settled beyond any question that the entire community property was subject to all obligations

incurred by the husband during marriage,[21] including liability for his torts.[22] That no distinction was made in this regard between the husband's separate debts[23] and community debts, is clear from the fact that the community property was held liable even for his antenuptial debts,[24] and it may be pointed out that this point has been so ruled[25] after the decision in *Flournoy* v. *Weiner*.

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[21] *Phillips* v. *Phillips*, 160 La. 813; *Marshall* v. *Mullen*, 3 Rob. 328 (S. Ct. La.); *Succession of Curtis*, 10 La. Ann. 662; *Succession of Kerley*, 18 La. Ann. 583; *Theus* v. *Smith*, 189 So. 305 (La. App.).

[22] *Bauer* v. *Albers*, 187 La. 496; *Edwards* v. *Ricks*, 30 La. Ann. 926; *Hawley* v. *Crescent City Bank*, 26 La. Ann. 230; *Kelly & Frazier* v. *Robertson*, 10 La. Ann. 303.

[23] See Daggett, The Community Property System of Louisiana, 18, 48, in which it is stated squarely that the community property is liable for the separate debts of the husband.

McKay, Community Property (Second Ed.), Section 802, states that the general rule is that community property may be seized and sold on forced sale or execution to satisfy a judgment against the husband, whether or not the debt is a community debt. He excepts only the State of Washington, where he states that community debts only may be satisfied out of community property. Although Washington has no statutory provision dealing generally with the question, the rule is as McKay has stated. *Poe* v. *Seaborn*, *supra; Schramm* v. *Steele*, 97 Wash. 309. But this does not mean all that the rule implies, for the reason that a very liberal view is taken of what constitutes a community debt. See *Henning* v. *Anderson*, 121 Wash. 58; *Kuhn* v. *Groll*, 118 Wash. 285; *In re Levinson*, 1 F. 2d 851 (C. C. A. 9th), certiorari denied, *sub nom. Greene* v. *Booth*, 267 U. S. 598.

[24] *Davis* v. *Compton*, 13 La. Ann. 396; cf. *Glenn* v. *Elam*, 3 La. Ann. 611.

[25] *Stafford* v. *Sumrall*, 21 So. 2d 83 (La. App.).

The further statement in that case with respect to the wife's right to secure a dissolution of the community partnership and delivery into her control of half of the community property whenever her husband proved to be an incompetent manager, is also a novel concept in Louisiana jurisprudence,[26] if the statement is read in isolation and away from the background of the developed law in that state. Article 2425 of the Civil Code (Appendix C, *infra*, pp. 96–97) provides merely that the wife may apply for a separation of property when her dowry is in danger owing to the husband's mismanagement or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. The provision is primaril designed to preserve her separate estate. See *Jones* v. *Jones*, 119 *La.* 677; *Davock* v. *Darcy*, 6 Rob. 342. While it has been held that she might sue him for a separation

[26] See the strong criticism of this statement by the Louisiana court in the light of its actual decisions in Altman, The Community Property Amendment to the Estate Tax Law, 21 Tax Magazine 643, 660–661 (1943).

The opinion of the court below contains a curious inconsistency. It repeats (R. 16) the statement made by the Louisiana court in the *Flournoy* v. *Wiener* case, but also states that (R. 17) "it is not believed that any one familiar with Louisiana law would have the temerity to urge that the husband had acquired any right by his wife's death." Yet, if while the community exists his power to deal with the property is as circumscribed as the opinion earlier suggested, it would hardly seem to be over-bold to conclude that upon her death rights and powers accrued to him at that time which before were denied.

of property, even though she had no dowry or paraphernal property, where he was insolvent and it was necessary to preserve her own earnings for the support of the family (*Carite* v. *Trotot*, 105 U. S. 751; *Gastauer* v. *Gastauer*, 131 La. 1),[27] it seems never before to have been suggested in Louisiana[28] that, absent the necessity to protect her separate estate or separate earnings, a wife could secure a separation of community property merely because her husband was an incompetent manager or of a speculative nature. In the typical situation such as that here involved, where

[27] This right of the Louisiana wife is somewhat analogous to, although not as broad as, that of the wife in some of the other community property states such as Idaho, Washington and Nevada, where she is entitled to manage that part of the community property which consists of her earnings. 1 de Funiak, Principles of Community Property, Sec. 114.

[28] Nor in view of the Louisiana cases cited in *Bender* v. *Pfaff*, *supra*, do we think that this Court intended in that case to suggest such a rule. The cases cited therein hold that she may obtain a dissolution of the community in order to preserve her separate property or her future separate earnings (*Wolf & Clark* v. *Lowry*, 10 La. Ann. 272; *Webb* v. *Bell*, 24 La. Ann. 75; *Brown & Learned* v. *Smythe*, 40 La. Ann. 325), and that she may have an accounting of his administration of the community for the period subsequent to her institution of a suit for divorce or separation from bed and board (*Hill* v. *Hill*, 115 La. 489; *White* v. *White*, 159 La. 1065). See also Article 150 of the Louisiana Civil Code, Appendix C, *infra*, p. 85. As to the period prior to that time, *McCaffrey* v. *Benson*, *supra*, and *Frierson* v. *Frierson*, *supra*, hold that she is not entitled to any accounting.

the community consists of property acquired through efforts of the husband and the wife is not engaged in any remunerative activity, she had no means of protection against his incompetent management, speculative nature, or expensive habits. And if it was intended in *Flournoy* v. *Wiener* to broaden her right to a separation of property, she may still not recover anything with respect to community funds which the husband has already squandered in speculation or riotous living. *McCaffrey* v. *Benson, supra; Frierson* v. *Frierson, supra*.

The Supreme Court of Louisiana is, of course, the ultimate authority as to the law of that state, and presumably it can, if it chooses, overrule prior decisions. It is difficult to conclude, however, that the court did have such an intention in *Flournoy* v. *Wiener,* for it did not disapprove any of its earlier decisions which were inconsistent with the statements referred to. Cf. *Hardin* v. *Jordan,* 140 U. S. 371, 384–388. Moreover, the statements were made in connection with the court's discussion of the constitutionality of the federal statute and not in a case involving a dispute between the parties, or those claiming under them, over property rights. That *Flournoy* v. *Wiener* has not been regarded in Lousiana as effecting any change in the local law is evidenced by the holding made after that decision that the

community property is liable for the husband's antenuptial debts. *Stafford* v. *Sumrall,* 21 So. 2d 83 (La. App.).

In any event, it is not necessary to labor the issue as to what is the present state of the Louisiana law upon these specific points, since we do not believe that the question here turns upon the *minutiae* of the property relationship between husband and wife. Within the broad framework of the community property system, the relative rights, privileges, powers and immunities of the spouses vary in considerable detail in each of the community property states, and may vary in each state from time to time. We do not believe that the constitutionality of the statutory provisions here involved depends upon these details of the property relationship, for that would mean that the statutory provisions might be constitutional in some of the community property states and not in the others, or that its constitutionality in any particular state might vary from time to time in accordance with local decisions. For present purposes it is enough that, whatever may be the precise limits of the powers of the wife and the restraints upon the husband, her interest in half of the property during the husband's lifetime does not approach anything close to an exclusive right to enjoy, manage and dispose of it; the death of the husband gives to her at least these significant attributes of ownership—the right to

sole management, control, enjoyment and dispositive power.

The Attorney General of Louisiana aptly summarized the situation in his brief in *Flournoy* v. *Wiener*, when he said (p. 16):

> Of all the elements which make up that bundle of rights and privileges called ownership, very likely the most important is the right of dominion—the right to alienate and control and that is what the wife in Louisiana gets by the death of her husband. Death is the liberating event to the wife. For the first time she has title to her property in the sense that she is capable of conveying it, mortgaging it, or making a donation *inter vivos*. For the first time she can take the revenues of her property; for the first time in any real sense she can call it her own.

3. *The statute is well within the scope of the Congressional power*

a. *Section 402 (b) (2)*.—The substantial alterations in the relationship of the spouses to the property which were occasioned by the death of the decedent here, furnish ample basis for the Congressional action. In *Tyler* v. *United States*, 281 U. S. 497, the Court sustained the constitutionality of the provision of the estate tax law which requires the inclusion in the gross estate of the full value of property held by a decedent and his spouse as tenants by the entirety (excluding that

portion economically traceable to the survivor). The opinion pointed out (p. 503) that the question in cases of this nature—

> is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

The opinion further noted (p. 503) that under local law no interest was regarded as passing to the survivor upon the death of the other spouse, but held that point to be not material. Since upon the death of one the survivor's relationship to the property was altered in a substantial degree, the statutory mandate was (p. 505) "obviously neither arbitrary nor capricious". The changes which the Court there deemed to be sufficiently substantial to warrant the Congressional action were thus stated (pp. 503–504):

> Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights

> were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will.

Subsequently *United States* v. *Jacobs,* 306 U. S. 363, sustained the power of Congress to require the inclusion in the gross estate of the full value of property held by the decedent and any other person as joint tenants (excluding that portion economically traceable to the other). This result was reached even though the changes in the survivor's relationship to the property which followed the death of the other tenant were not as great in the case of the joint tenancy as in the case of the tenancy by the entirety. In the case of the tenancy by the entirety involved in *Tyler* v. *United States,* neither tenant could have disposed of any part of the estate without the consent of the other, but in the joint tenancy considered in the *Jacobs* case either could, at any time and for any reason, have sold his or her interest in the property and severed the tenancy. Yet, as the Court pointed out, unless the joint

tenancy were so severed the entire estate would pass to the survivor; and at that time the survivor would acquire the sole right to sell the entire property without the risk of loss which might have resulted from partition of the tenancy during its existence. This was deemed to be (p. 371) a sufficient "shifting of economic interest", a sufficient "change for the survivor's benefit" to sustain the Congressional action.

The *Tyler* and *Jacobs* cases do not purport to establish the outer limits of the Congressional power, but in any event the instant case is well within these decisions. The alteration in the wife's relationship to the community property, the shifting of economic interest, which occurred upon the death of the decedent here, is far more substantial than those which were deemed sufficient in the *Tyler* and *Jacobs* cases. Whatever power she may have had prior to the death of the decedent to secure a separation of property, it was certainly not as broad as the unrestricted power which the wife had in the *Jacobs* case to dispose of her half interest for any reason whatsoever, or, indeed, for no reason at all if she felt so inclined. And the death of the husband here resulted in much more than merely freeing the wife's powers of possession, use and enjoyment from the exercise of co-equal rights of her husband (as in the *Tyler* case).

The court below sought to distinguish (R. 18) the *Tyler* and *Jacobs* cases on the ground that

survivorship is an incident of joint tenancies and tenancies by the entirety; that the death of one gave to the other a power of testamentary disposition not previously enjoyed; and that this is not the case with community property since each spouse has power of testamentary disposition over half of the property.[29] While it is true that succession to the testamentary power was one of the incidents relied upon in the *Tyler* and *Jacobs* cases, the basis of those decisions was by no means limited to that factor. That is only one of the incidents of ownership of property, and was only one of those that shifted at the death of the decedent. Nor did those decisions in any way intimate that the shifting of that particular incident was the only one which could justify Congress in extending the coverage of the estate tax to co-owned property. They recognize that the shifting of any group of the incidents of ownership, any substantial economic interest, is enough. See *Whitney* v. *Tax Commission,* 309 U. S. 530, 539. And, as we have pointed out, the rights and privileges which the wife acquired here, with respect to her half interest, upon the death of the decedent are at least as extensive as those which were acquired by each of the surviving wives, with respect to her half interest, in the *Tyler* and *Jacobs* cases.

[29] This is not true in Nevada and New Mexico. In those states the wife has no power of testamentary disposition. 1 de Funiak, Principles of Community Property 717, fn. 39.

The *Tyler* and *Jacobs* cases are also sought to be distinguished on the ground that there the wife "contributed" nothing to the co-owned property, whereas under the local law the wife here is regarded as having "contributed" equally to the acquisition of the community property, even where it consists entirely of her husband's earnings and the income from his separate property. That argument is based upon the fiction in community property states that the wife "earns" half of the income attributable to her husband's efforts, and that she therefore "contributes" one-half of the community estate. But it is not to be assumed that the wife's participation in her husband's efforts is any less in any of the non-community states, and it is appropriate for Congress to *classify* these situations similarly. Thus, there is no reason to believe that the wife, in cases of joint tenancies, was any less responsible for her husband's accumulation of the property involved. Nor can one assume that she participated less in her husband's affairs in cases where her dower interest is included in his gross estate.

Moreover, the foregoing contention also misses the essential rationale of the opinions in the *Tyler* and *Jacobs* cases. They did not turn upon a consideration of the source or origin of the co-owned property, but upon the facts that such a state of co-ownership existed at the time of death and that death was the occasion for enlargement of the survivor's rights and powers.

Thus in *Dimock* v. *Corwin* (decided with the *Jacobs* case) a part of the joint property had been contributed by the surviving wife. Although it is true that the property she had contributed had been given to her by her husband prior to the creation of the joint tenancy, nevertheless after the gift it was hers to do with as she pleased; yet the full value of the joint tenancy was held to be includible in the husband's estate. This decision also negatives the further suggestion which has been advanced that it is critical to the validity of such a statute that the tax be measured by no more than the value of property which has been the subject of a transfer by the decedent with the retention of rights until his death. Moreover, it has been held that the full value of the co-owned property is includible in the gross estate even though the tenancy was created prior to the enactment of the first estate tax in 1916. The *Jacobs* and *Dimock* cases were such cases. See also *Third National Bank & Trust Co.* v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618; *Whitney* v. *Tax Commission*, *supra*.[30]

[30] These cases also effectively dispose of the contention (see the opinion of the District Court in the *Rompel* case, R. 19-20) that the 1942 amendments are unconstitutionally retroactive. See also *Milliken* v. *United States*, 283 U. S. 15.

There are only a few instances in our history in which this Court has held a federal tax to be unconstitutional on the ground of retroactivity. *Nichols* v. *Coolidge*, 274 U. S. 531 (Justices Holmes, Brandeis, Sanford and Stone concurring only in the result); *Blodgett* v. *Holden*, 275 U. S. 142 (equally

Furthermore, there is plainly no constitutional mandate which binds Congress in enacting revenue legislation to the "amiable fiction" of the civil law that a Louisiana wife earns half of her husband's salary, any more than it is bound by the "amiable fiction" of the common law, in dealing with tenancies by the entirety, that husband and wife are one person. See *Tyler* v. *United States, supra,* p. 503. The fictional basis of the Louisiana law in this respect is emphasized by the fact that the wife's interest is the same even though she may in fact be unable to make any contribution to the marital partnership.[31] Thus even though the wife should be insane, and in fact a helpless burden to the community rather than an aid thereto, her rights continue and the husband cannot secure a separation of property. See *Hotard* v. *Hotard,* 12 La. Ann. 145, in which the court said:

> It may be true, that among the rude and hardy tribes of German origin who introduced the custom of the matrimonial community of gains into Gaul, whence it has been transmitted to us, the wife was the equal partner of her husband's toil. If, in the change of manners which a higher

divided count, Justice Holmes, Brandeis, Sanford and Stone concurring only in the result); *Untermyer* v. *Anderson,* 276 U. S. 440 (Justice Sanford concurring only in the result and Justices Holmes, Brandeis and Stone dissenting). Cf. *Helvering* v. *Helmholz,* 296 U. S. 93, and *White* v. *Poor,* 296 U. S. 98.

[31] Cf. Altman, Community Property: Avoiding Avoidance by Adoption in the Revenue Act, 16 Tax Magazine 138, 184 (1938).

> civilization has produced, this prime reason of the community law has ceased to exist, yet the institution remains.

The treatment which has long been accorded dower and curtesy interests (or their modern statutory substitutes) furnishes strong support for the Congressional action here involved. The statute has since 1918 required the inclusion in the gross estate of such an interest of a surviving spouse, and this provision has been held valid even though under state law the interest of the survivor is regarded as vested by virtue of the marriage and as not passing by descent.[32] There are, of course, technical differences between a surviving spouse's compulsory share in the common law states and the rights of a surviving spouse in a community property state. But these technical differences afford no ground for distinctions upon the constitutional level. Both are systems which have been developed for the regulation of marital property rights; under both provision is made for a non-barrable interest in the surviving spouse;[33] and neither represents an interest created by a private conveyance. It is hardly appropriate to enter into a discussion of which is the better system, but it should not be forgotten that the community property system is at most

[32] See the cases collected in I Paul, Federal Estate and Gift Taxation, Sec. 5.03, fn. 1.

[33] All but very few of the states provide for such a compulsory share for the surviving spouse. See 3 Vernier, American Family Laws, Sections 189 and 216.

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only one mode of arranging marital property rights. See Powell, Community Property—A Critique of its Regulation of Intra-Family Relations, 11 Wash. L. Rev. 12 (1936).

An additional strong analogy is to be found in the Louisiana institution of forced heirship which is written into the Louisiana Constitution.[34] Forced heirs are children (or their descendants) and parents (Louisiana Civil Code, Articles 1493–1495, Appendix C, *infra*, pp. 85–86). They have an interest, known as the *legitime*, of which they cannot be deprived except upon specific and narrowly circumscribed grounds.[35] The *legitime* may not be defeated even by gifts *inter vivos* for upon the death of the donor the forced heirs may recover from the donee all of the excess over the "disposable portion."[36] They need show no fraud or intent to defeat their *legitime*. At the donor's death they simply have an absolute right to a share of the total of (a) the value of the property in the estate, plus (b) the value, as of the time of death, of all property given away by the decedent,[37] regardless of when

[34] Louisiana Constitution (1921), Article IV, Sec. 16.

[35] The permissible reasons for disinheritances are set forth in Articles 1621–1623 of the Louisiana Civil Code (Appendix C, *infra*, pp. 86–87). There are ten grounds upon which a child may be disinherited, nine for descendants of a child, and seven for parents.

[36] The "disposable portion" varies from one-third to two-thirds depending upon the number of surviving children or their descendants.

[37] Louisiana Civil Code, Articles 1502, 1505.

it was given away.[38] Since a wife may recover a share of community property which has been disposed of by her husband only in the case of a fraudulent disposition and then only on "satisfactorily proving the fraud" (Article 2404 of the Louisiana Civil Code), it has been observed that the *legitime* is accorded a broader safeguard than the community interest of the wife. See Cahn, Restraints On Disinheritance, 85 Pa. L. Rev. 139, 153, fn. 45 (1936).

The decedent's relationship with respect to the half of the community property which went to his wife was thus not very different from his relationship to most (two-thirds, since he was survived by more than two children) of the other half. Both the wife and the children had rights to share, in amounts fixed by the local law, in all of the property remaining at his death. Yet it seems never to have been suggested, and certainly could not rightly be contended, that the compulsory share of his children could not be included in his gross estate for purposes of the federal tax.[39] And it is difficult to perceive how Congress can be said to be constitutionally for-

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[38] Thus children, as forced heirs, may recover from a donee property given away by their father before he was married. *Guidry* v. *Caire*, 181 La. 895.

[39] The tax may apply even though the decedent was completely without power of testamentary disposition. For example, infants and insane persons may not dispose of their property by will, yet their estates are of course subject to the tax. See as to insane persons, *City Bank Co.* v. *McGowan*, 323 U. S. 594.

bidden to accord similar treatment to situations so similar to each other in their practical aspects.

It should be emphasized that the statute may be invalidated under the Fifth Amendment only if it is completely arbitrary and capricious. We do not believe that it can be said that Congress completely overstepped the bounds of reason in concluding that the changes which occurred upon the death of the decedent here are sufficiently similar to those which have long been the occasion for the tax to require, in the interests of uniform and equitable operation, that this situation be accorded similar treatment.

In fact, it had been settled long prior to the *Tyler* case that the shifting of economic interests resulting from the death of a spouse in a community property state furnished ample occasion for the imposition of a death duty. *Moffitt* v. *Kelly,* 218 U. S. 400, held that there was no violation of the Fourteenth Amendment in the imposition of the California inheritance tax upon the full value of the community property on the death of the husband.[40] And it should be noted that whatever restraints the Fifth Amendment imposes upon the exercise of the federal taxing

[40] The fact that it was subsequently held that the California wife's interest in the community property prior to 1927 was not a vested interest (compare *United States* v. *Robbins,* 269 U. S. 315, with *United States* v. *Malcolm,* 282 U. S. 792) in no way impairs the authority of *Moffitt* v. *Kelly, supra,* for that case was decided upon the assumption that her interest was "vested."

power, they are not as great as those imposed upon the states by the Fourteenth Amendment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

Congress has concluded that, from the standpoint of the practical impact of the estate tax, it is necessary, in order to equalize the operation of the tax throughout the country, to treat community property in the same way in which it has treated tenancies by the entirety, joint estates, and compulsory shares of surviving spouses and others in the estate of a decedent. We respectfully submit that Congress may not properly be charged with having played the despot[41] in concluding that that which it has ordained comports with the realities of tax life.

At bottom the issue here is simply one of the power of Congress to classify. Since, however, it is so well settled that Congress has the broadest powers of classification in relation to taxation (*Steward Machine Co.* v. *Davis*, 301 U. S. 548), the challenge to the statute has been couched in different language. Cf. brief of Attorneys General of California, Arizona, etc., in *Flournoy* v. *Wiener*, p. 26, fn. 11. But reduced to its essentials the argument comes to this: Differences between the community property system on the one hand, and joint estates, tenancies by the entirety and compulsory shares of surviving spouses, on the other, are advanced as reasons why Congress

[41] Cf. *Burnet* v. *Wells*, 289 U. S. 670, 682.

should not be permitted to treat them in a similar fashion. But these considerations are legislative in character; they are relevant only with respect to the desirability of the legislation, not its validity.

b. *Section 404 (a)*.—The constitutionality of the amendments made by Section 404 (a) of the Revenue Act of 1942 to Section 811 (g) of the Internal Revenue Code, relating to the inclusion in the gross estate of proceeds of policies of insurance, was not dealt with by the court below as an independent issue. In the main this section does not present any substantially different problem from that presented by Section 402 (b) (2) and all of the reasons which refute the charge that Section 402 (b) (2) is invalid are equally applicable to Section 404 (a). There are, however, additional reasons which support the validity of Section 404 (a) as here applied.

The amendments made by Section 404 (a) are not directed primarily at the community property problem. They deal with insurance policies acquired with community funds only as an incident to the broader purpose of the section to resolve problems relating generally to the inclusion of the proceeds of insurance policies in a decedent's estate. Section 811 (g) had previously required the inclusion in the gross estate of the proceeds of policies of insurance "taken out by the decedent" upon his own life. The generality of the phrase "taken out by the decedent" had been productive

of much uncertainty. It was not clear whether proceeds of a policy of life insurance were to be included in a decedent's gross estate only to the extent to which he had paid the premiums or whether, regardless of whether he had paid the premiums, they could be included in the gross estate if the decedent at the time of his death had substantial incidents of ownership in the policy, such as the right to surrender it for cash or to change the beneficiary. Attempts to settle the matter by administrative regulations not having been successful (see 1 Paul, Federal Estate and Gift Taxation, Sections 10.12–10.14), Congress amended the Code by Section 404 (a) of the Revenue Act of 1942, for the express purpose of clarifying the subject. H. Rep. No. 2333, *supra*, p. 162; S. Rep. No. 1631, *supra*, p. 234. The section provides for the inclusion of the proceeds of insurance policies in a decedent's gross estate if he has paid the premiums *or* has retained incidents of ownership in the policy. Among the examples of "incidents of ownership, the possession of which at death forms the basis for inclusion of insurance proceeds in the gross estate," the committee reports list "the power to change the beneciary". H. Rep. No. 2333, p. 163; S. Rep. No. 1631, p. 235. The decedent in this case had that power with respect to each of the policies here involved.

Section 404 (a) does not appear to be in any way challenged by the appellees, insofar as its

general operation is concerned. The contention seems to be not that these amendments are in general invalid, but that in giving effect to them Congress had no power to provide further that (a) insurance premiums shall be deemed to have been paid by the insured if they were paid with community funds not attributable to the earnings or income from the separate property of the surviving spouse, and (b) that the term "incidents of ownership" shall include such interests "possessed by the decedent at his death as manager of the community".

Insofar as the first of these points is concerned, it is clear that, if for the reasons previously advanced herein, the funds with which the premiums were paid might have been included in the decedent's gross estate if they had been retained until his death, there can be no greater objection to the inclusion in his estate of the proceeds of insurance policies purchased with those funds.

No question is properly raised by the instant case with respect to the validity of the further statutory direction that insurance proceeds shall be included in the gross estate if the decedent possessed, at the time of his death, incidents of ownership with respect to the policy in his capacity as manager of the community. For the power which the decedent here had to change the beneficiary in each policy was one which was strictly personal to him. His wife did not take the proceeds of the policies by virtue of any community

interest therein. Her interest derived solely from the contract of insurance, and she took the proceeds only because she was the named beneficiary at the time of his death. Regardless of the fact that the policies were contracted for during the marriage, and regardless of the further fact that the premiums had been paid with community funds, under Louisiana law the decedent could at any time have changed the beneficiary to whomsoever he chose. *Sizeler* v. *Sizeler,* 170 La. 128; *In re Sun Life Assur. Co.,* 155 So. 399 (La. App.); *DeLappe* v. *Commissioner,* 113 F. 2d 48 (C. C. A. 5th); *Prudential Ins. Co. of America* v. *Taylor,* 46 F. Supp. 115 (W. D. La.). The decedent therefore had full power to direct the disposition of the insurance proceeds at his death. And since that power was not restricted by any concept deriving from the community property system, or in any other way, it was in no sense one exercised by him "as manager of the community". This is enough, quite aside from any other consideration, to support the inclusion of the proceeds of these policies in his gross estate. There is thus an independent basis for the valid application here of Section 404 (a).

4. *The burden of the tax*

It has been suggested that the federal statute requires the heirs or legatees of the decedent to bear the entire weight of the tax, leaving the surviving spouse's share free of any burden. It is said that where there are children who would nor-

mally be the beneficiaries of the decendent's testamentary disposition, this might result in leaving nothing for the children, but the wife, although she might be less deserving, would take her full share.

So far as the federal law deals with the problem it provides that the tax shall be a lien on all of the property included in the decedent's gross estate. Internal Revenue Code, Section 827 (a); *Detroit Bank* v. *United States,* 317 U. S. 329, 331–333. The tax is therefore a lien on all of the community property brought within the gross estate and under Section 827 (b) of the Code, as amended by Section 411 of the Revenue Act of 1942 (Appendix A, *infra,* p. 75), the surviving spouse is personally liable for the tax to the extent of the value of his or her share of the property. Moreover, the federal statute contemplates that the tax "be paid out of the estate before its distribution." (Internal Revenue Code, Section 826 (b).) This language seems to be literally applicable to the community property interest of the surviving spouse, since his or her sole ownership right attaches only to half of the residue of the property remaining after the death of the other spouse. Therefore, if the question were one of federal law alone it seems that the weight of the federal tax would be borne equally by the surviving spouse and the legatees of the decedent.

But the conclusive answer to the whole argument on this point is that the federal statute does

not undertake to specify how the burden of the tax shall finally be distributed. It provides for payment of the tax out of the estate as a whole, leaving to the states the determination of its ultimate thrust. *Riggs* v. *Del Drago*, 317 U. S. 95. If, therefore, it should develop that there is really a problem with respect to the distribution of the tax burden, it is one which the states have ample power to resolve.

5. *The effect of the statute where the wife predeceases the husband*

Various contentions have been advanced with respect to the operation of the statute in cases in which the wife predeceases the husband. With respect to all of these it may be observed that no such case is here presented, and it is fundamental that one may complain only of violation of his own constitutional rights, not those of another. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 177; *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 558. Statutes are not declared unconstitutional by a measure of their possible effect in supposititious cases. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355, rehearing denied, 302 U. S. 772; *Tennessee Pub. Co.* v. *Amer. Bank*, 299 U. S. 18, 22. In any event we think it plain that there is no constitutional objection to the statute in such cases.

The statute continues the pre-existing law by requiring that there be included in the gross es-

tate at least that portion of the community property which was subject to the decedent's power of testamentary disposition. Thus if in the instant case the decedent's wife had predeceased him, one-half of the community property then existing would have been includible in her gross estate since she had power of testamentary disposition over that portion. It is difficult to perceive how there could be thought to be any objection to this operation of the statute for while the free power of testamentary disposition over property is not an indispensable requisite to the operation of the tax,[42] that is the most obvious situation in which the tax applies. The wife's power of testamentary disposition is equivalent to a general power of appointment. The statute has long taxed the value of property passing under the exercise of a general power of appointment,[43] and now taxes the value of such property to the holder of such a power whether he chooses to exercise it or not.[44]

If all of the community property represents earnings of the wife, or income from her separate property, then it will all be included in her estate, if she should die first. It is contended that since the husband was previously entitled to manage the property, there is at her death no shift of economic interest to him with respect to

[42] See fn. 39, *supra*, p. 43.

[43] *Estate of Rogers* v. *Commissioner*, 320 U. S. 410.

[44] Section 811 (f) of the Internal Revenue Code, as amended by Section 403 (a) of the Revenue Act of 1942.

his half. If, however, the rights of the wife in the property during the existence of the community are as broad as was stated by the Supreme Court of Louisiana in *Flournoy* v. *Wiener,* then it is apparent that at her death he is relieved from a number of serious limitations upon his power to deal with the property. And even if the limitations upon his powers should be thought to be narrower than would appear from an isolated reading of *Flournoy* v. *Wiener,* nevertheless, upon the death of the wife his interest in the property is freed from the fetters deemed substantial in *Bender* v. *Pfaff, supra.*

6. The so-called irrebutable presumption

The statute excepts from the gross estate that portion of the community property which represents the earnings, or the income from the separate property, of the surviving spouse. It is argued that since it is not possible to trace the source of community property in order to show the portion, if any, which should be excluded, the statute creates an irrebutable presumption that the whole community property was produced by the spouse first to die and taxes the whole property to the estate of that spouse.

It is plain that the purpose of the section is simply to limit the amount of property includible in the estate of whichever spouse first dies to that portion of it which is economically attributable to him or her. S. Rep. No. 1631, p. 231 (Appendix

B, *infra*). It is true that the statute places the burden upon the taxpayer of showing the portion which should be excluded, but this simply follows the traditional pattern which obtains in tax cases of placing the burden of proof, not upon the Government, but upon those who are in possession of the facts. *Welch* v. *Helvering*, 290 U. S. 111, 115. The provision is certainly justifiable as a means of facilitating the administration of the statute.

The characterization of the provision as an "irrebuttable presumption" is plainly without support in the statute. Nor do we agree that it is not practically possible to show what part of the property, if any, is economically attributable to the surviving spouse. The burden is no different from that of showing what part of the property owned by the spouses at the time of the death of one of them is separate as distinguished from community property, a burden which the estate of such a spouse is already required to assume, not only for purposes of administration and succession but also for purposes of federal estate, gift and income taxes.[45] Nor is the problem different from that of showing what portion of the co-

[45] See, e. g., *Beals* v. *Fontenot*, 111 F. 2d 956 (C. C. A. 5th); *Gump* v. *Commissioner*, 124 F. 2d 540 (C. C. A. 9th), certiorari denied, 316 U. S. 697; *Scofield* v. *Weiss*, 131 F. 2d 631 (C. C. A. 5th); *Shea* v. *Commissioner*, 81 F. 2d 937 (C. C. A. 9th); *Hill* v. *Commissioner*, 24 B. T. A. 1144; *Estate of Wilson* v. *Commissioner*, 2 T. C. 1059.

owned property was contributed by the surviving spouse in the case of joint tenancies and tenancies by the entirety. See, e. g., *Berkowitz* v. *Commissioner,* 108 F. 2d 319 (C. C. A. 3d); *Richardson* v. *Helvering,* 80 F. 2d 548 (App. D. C.). In the typical situation, such as is here involved, where the community property has been produced by the husband's efforts, there is no problem of tracing. The whole is clearly to be included in the gross estate of the husband, if he dies first and if the wife dies first, only one-half will be included as before the 1942 amendments.

Certainly, it cannot be assumed, on the basis of the facts in this case or those in the companion *Rompel* case, that the statute does impose an impossible burden. Such a conclusion could be reached only after a claim was made that some part of the property was economically attributable to the wife, all available facts had been submitted in substantiation of the claim and, nevertheless, the claim had been rejected. See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, rehearing denied, 302 U. S. 772. Constitutional questions of this character are not to be decided in advance upon the basis of assumptions and conjectures.

It has been argued that the community estate might not be attributable to the earnings of either spouse or to income from his or her separate property but might have been acquired on

credit of the community. But all community accumulations must have their beginning in the efforts of one of the spouses and in any event problems such as these must await the application of the statute in particular cases. Clearly, the statute gives scope for proper interpretative regulations in carrying out the will of Congress that the portion economically attributable to the surviving spouse shall be excluded (S. Rep. No. 1631, p. 231), and if the rules of allocation adopted by the Treasury appear unjust and unreasonable, they can be challenged in the courts. Cf. *Berkowitz* v. *Commissioner, supra,* and *Richardson* v. *Helvering, supra.* Unconstitutionality of the statute cannot be predicated on an assumption that upon some hypothetical set of facts, not present here, the statute might be harshly or unreasonably applied. Cf. *Anniston Mfg. Co.* v. *Davis, supra.*

C. THE UNIFORMITY AND APPORTIONMENT REQUIREMENTS

It is contended that the statute offends the uniformity requirement of Article 1, Section 8, Clause 1, of the Constitution, and in the *Rompel* case the District Court so concluded. It may be remarked parenthetically that, since the prime purpose of the 1942 amendments was to eliminate inequalities in the application of the tax and to achieve a greater degree of uniformity in its operation throughout the country, it is somewhat ironic to find them attacked upon this ground.

It has long been settled that within the meaning of this constitutional provision a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U. S. 580, 594.[46] The fact that the extent and incidence of a tax may be affected by differences in state laws does not result in an infringement of the uniformity requirement (*Phillips* v. *Commissioner*, 283 U. S. 589, 602; *Riggs* v. *Del Drago*, 317 U. S. 95, 102) for the requirement is one of geographic uniformity, not of intrinsic equality and uniformity in operation (*Knowlton* v. *Moore*, 178 U. S. 41, 83–109). The Constitution does not require that a tax "have an equal effect in each State." *Id.* p. 104. The 1942 amendments obviously lay down a uniform rule with respect to community property interests wherever they may be found. It is not material that such interests may not be found in all of the states for "differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell

[46] See also *Nicol* v. *Ames*, 173 U. S. 509, 521; *Patton* v. *Brady*, 184 U. S. 608, 622–623; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158, 174; *Billings* v. *United States*, 232 U. S. 261, 282–284; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24; *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392–393; *Bromley* v. *McCaughn*, 280 U. S. 124, 138; *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Lerner Stores Co.*, 314 U. S. 463.

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out a lack of uniformity". *Poe* v. *Seaborn*, *supra*, pp. 117–118.[47]

The holding by the District Court in the *Rompel* case that the amendments violate the uniformity requirement proceeds from a misconception both of the nature of the estate tax in general, and of that of the amendments. The court there said (*Rompel* R. 21, 22) that the estate tax is one "laid on transfers at death of property owned by the decedent"; that "This is the rule applicable to all states, common law and community property alike", but in community property states "The acquisition of property acquired during marriage" is made an additional "subject of tax"; and that this subject is not taxed in the other states. This is hardly an accurate analysis.

The federal estate tax has, it is true, been described as one upon the transfer of property at death.[48] But such statements, while they are a sufficiently critical description of the tax in

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[47] The estate tax at one time provided for the inclusion in the gross estate of real property only if it was subject to administration expenses. Although the effect of this provision was to make realty subject to the tax only in some thirty-six states, it was nevertheless held to be not violative of the uniformity requirement. *Gottlieb* v. *White*, 69 F. 2d 792 (C. C. A. 1st), certiorari denied, 292 U. S. 657; *Continental Illinois Bank & Trust Co.* v. *United States*, 65 F. 2d 506 (C. C. A. 7th), certiorari denied, 290 U. S. 663; cf. *Crooks* v. *Harrelson*, 282 U. S. 55.

[48] E. g., *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Nichols* v. *Coolidge*, 274 U. S. 531, 537.

general and for most purposes, did not purport to be, and are not, completely comprehensive characterizations. The statute does of course operate upon such transfers. This is the office of Section 811 (a) which directs the inclusion in the gross estate of all property "to the extent of the interest therein of the decedent at the time of his death". That, however, by no means marks the limit of the scope of the tax. The other subdivisions of Section 811 are directed not at property passing at death, but at property which may have been the subject of any of a variety of *inter vivos* transfers (many of them complete and beyond any control by the transferor) and at other situations in which there has not even been a transfer at any time by the decedent. All of these have been included because Congress has deemed them to be of sufficiently practical economic equivalence to transfers at death to justify, in the interests of securing a fairer operation of the tax, an equivalent treatment.

Under Section 811 (c) there must be included in the gross estate property which has been transferred in contemplation of death; yet the decedent could not be described, even in the loosest sense, as the "owner" of such property at the time of his death.[49] The same section requires the inclusion

[49] In many cases in which property has been held to be includible in the gross estate on the ground that it had been transferred in contemplation of death, the transfers occurred a long time prior to death. For example, the period between

in the gross estate of irrevocably transferred property with respect to which the decedent has retained a life estate (*Helvering* v. *Bullard*, 303 U. S. 297), although at that time "no interest in the property" passes, death having merely "obliterated" the life estate (*May* v. *Heiner*, 281 U. S. 238, 243). Section 811 (d) covers transferred property with respect to which the decedent has retained the power to make any change in the enjoyment, even though such power could only be exercised with the consent of parties having adverse interests. *Helvering* v. *City Bank Co.*, 296 U. S. 85.

Nor is the scope of the statute limited to property with respect to which the decedent has at some time made a transfer. Under Section 811 (b) the dower or courtesy interest of the surviving spouse must be included in the gross estate, although such an interest is not regarded as ever having been the subject of a transfer from the decedent to the survivor.[50] Section 811 (f) covers property with respect to which the decedent had a general power of appointment, regardless of whether the power was exercised, and as well

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the transfer and the death was more than ten years in *In re Kroger's Estate*, 145 F. 2d 901 (C. C. A. 6th), certiorari denied, April 2, 1945, and it was nineteen years in *Estate of Gane*, decided January 3, 1945 (1945 P-H T. C. Memorandum Decisions Service, par. 45,007).

[50] See pp. 40–41, *supra*.

where the power is one which has been donated[51] to the decedent as where it is one which he has retained. And Section 811 (e) relates to property held in various forms of co-ownership, joint tenancies, tenancies by the entirety, and now community property.

These examples sufficiently illustrate that the scope of the estate tax is not limited to property transferred by the decedent at his death, or even to property with respect to which the decedent has at some time made a transfer.

An attempt is made here, as in *Whitney* v. *Tax Commission,* 309 U. S. 530, to distinguish these instances on the ground that they involve mere substitutes for testamentary dispositions, but this "disregards the emphasis in these cases on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax." *Whitney* v. *Tax Commission, supra,* p. 539.

The characterization by the court in the *Rompel* case of the 1942 amendments as levying a tax

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[51] It may be further observed that the donee of such a power has frequently been characterized as not the "owner" of the property over which it may be exercised. *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 59; *Townshend* v. *Harrowby*, 27 L. J. (Ch.) 553, 557; *In re Armstrong*, 55 L. J. Q. B. 578, Part 2; *Gilman* v. *Bell*, 99 Ill. 144, 150; *R. I. Hospital Trust Co.* v. *Anthony*, 49 R. I. 339, 343; 1 Tiffany, Real Property (Second ed.), Sec. 315; Gray, The Rule Against Perpetuities (Fourth Ed.), Sec. 474.2.

upon "The acquisition of property acquired during marriage" is even more obviously erroneous. No such event is made the occasion for the tax. Precisely as in the case of the other forms of joint ownership dealt with by Section 811 (e), the occasion for the tax is the death of one of the owners of co-owned property and the shifting at that time of economic benefits therein to the survivor. There is no tax upon "The acquisition of property acquired during marriage".

Since the Constitution imposes no requirement that a tax have an equal operation in each state, we do not think it necessary to discuss in detail the various hypothetical situations which have been advanced as illustrations of instances in which the total tax burden of spouses in the community property states will be greater than that of spouses in the common law states.[52] For even

[52] This is not to say that we agree that the illustrations advanced do show that the community property states will be in a disadvantageous position. Some of them involve a comparison of dissimilar situations and others proceed from erroneous statements with respect to the operation of the statute.

For example, it is not true that community interests are denied the credit against the tax allowed by Section 812 (c) for property which has within five years been taxed in a prior decedent's estate. Treasury Regulations 105, Sec. 81.41 (Appendix A, *infra*, p. 76).

Nor is it true that only half of the community debts may be deducted. While there has been no formal ruling on the point, by letter of May 24, 1943, the Bureau of Internal Revenue has advised an Internal Revenue Agent in Texas,

if it should be assumed that the unequal operation complained of will in fact result the answer is that (*LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392–393)—

> The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation.

There runs through all of the cases a fundamental appreciation that whenever inequalities may be present in the operation of a federal tax, the remedy does not lie in restricting the power of Congress by a strained and narrow construction of the Constitution. The recognition of latitude in the legislative branch of the Government to deal with such matters permits them to be alleviated as they make themselves manifest. And the history of federal taxation discloses a picture of constant Congressional effort in that direction (the very amendments here involved are

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in response to his inquiry, that "where the whole community property is included in the decedent's gross estate, the full amount of the community debts and administration expenses should be allowed as deductions. Where less than the full community estate is included, deductions should be allowed in the proportion that the community property included in the gross estate bears to the total community property." In the instant case the whole of the community debts and expenses have been allowed as deductions. (R. 10.)

illustrative), rather than in the direction of inequality. In this connection it may be observed that it is of no little historical significance that no case has been found in which this Court has ever felt it necessary to strike down a revenue measure on the ground that it violated the uniformity requirement.

Although we do not believe that there is any adequate basis for the allegations that the community property states will find themselves at a disadvantage[53] with respect to the estate tax, or that any such disadvantage would result in abandonment of that system (see pp. 68–69, *infra*), the fact that they have it within their power to eliminate any such disadvantage by changing their local statutes[54] constitutes an effective answer to

[53] In many cases spouses in community property states still retain a substantial tax advantage. For example, in a community property state where the wife dies first and the situation is the typical one in which the community property consists of assets accumulated as a result of the husband's efforts, the wife's estate will be taxed with respect to one-half of the value of the property, leaving the husband's estate to be taxed only with respect to the remaining half. In the common law states, on the other hand, the entire tax will be borne by the husband's estate and due to the graduated rates that tax will be greater than it would have been had the aggregate estate been divided and taxed as two units.

[54] Indeed, in some of the community property states husband and wife may by agreement overcome the effect of the community property law. This may be done at any time during the marriage in California (*Estate of Watkins*, 16 Calif. 2d 793); Washington (*State ex rel. Van Moss* v. *Sailors*, 180 Wash. 269), and Arizona (*Estate of Baldwin*,

the contention that the 1942 amendments violate the uniformity requirement. Even if they had to amend their constitutions to secure for their citizens equality with the citizens of other states in the matter of federal estate taxation, the federal statute would nevertheless not be in contravention of the uniformity clause. *Florida* v. *Mellon,* 273 U. S. 12.[55]

50 Ariz. 265). In Louisiana such an agreement may not be entered into after the marriage but the parties may agree prior to marriage or in their marriage contract that the community of acquets and gains shall not apply to them. Articles 2332, 2392, 2399 and 2424 of the Louisiana Civil Code, Appendix C, *infra*, pp. 87–88, 92, 96.

[55] Some of the community property states originally had the common law system. See I de Funiak, Principles of Community Property, c. IV. In Arizona, Chapter XXVII of the Arizona Code (Howell's) adopted by the first territorial legislature on November 10, 1864, contained 32 sections relating to dower. The law of community property was not adopted until 1865, by an act of the second territorial legislature, dated December 3, 1865, Section 10 of which expressly provided that there should no longer be any estate of dower and courtesy allowed. This statute embodied almost verbatim the provisions of the original California community property law of 1850. In Idaho, the first territorial legislature, by a sweeping act, approved June 4, 1864, adopted the common law of England "as the law of the land in the territory," so far as the same was not inconsistent with the provisions of the Constitution and laws of the United States, the organic law of the territory, and the laws of the territory. The community property law, also taken almost verbatim from the original California statute, was first adopted at the fourth session of the territorial legislature by an act approved January 9, 1867. In Nevada, too, the very first act of territorial legislature at its first session was to provide that the common law of England, so far as it was not

Little need be said concerning the contention that the tax is direct within the meaning of Article 1, Section 2, Clause 3 and Article 1, Section 9, Clause 4 of the Constitution, and therefore invalid because not apportioned. The argument, proceeding from the assertion that there has been no transfer to the wife but that she merely takes that which she always "owned", is precisely that which was rejected in the *Tyler* case, *supra*. See also *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160. Similarly with respect to the further suggestion that the tax is in effect one upon the community property itself the tax is (*Phillips* v. *Dime Trust & S. D. Co.*, *supra*, p. 165)—

> a valid indirect tax, measured by the value of the property, rights in which devolved

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repugnant to, or inconsistent with the Constitution or laws of the United States, or the law of the territory, should be the rule of decision in all courts of the territory. This was in effect, so far as concerns property rights, until the first community property law was enacted (Stat. 1864–1865, p. 239). *Darrenberger* v. *Haupt*, 10 Nev. 43; *Lake* v. *Bender*, 18 Nev. 361, 382. In Washington, the common law right of dower and courtesy existed from 1855 to 1869. The right of dower is repeatedly referred to in the laws up to that time and was elaborately provided for at the 1864 session of the territorial legislature by an act, which, like the Arizona statute of 1864, covered 32 sections and was passed on June 30, 1864. A community property act, also in substantially identical language as the original California act, was first adopted by an act approved November 29, 1871. The latter act was in turn displaced by the act of November 14, 1879, which, with amendments, is in effect today. As to Oklahoma, and Oregon, see fn. 56, p. 68.

> upon the surviving [spouse] upon the happening of an event, the death of the other [spouse] * * *

And this is true regardless of how the weight of the tax may ultimately be felt.

D. THE TENTH AMENDMENT

The Tenth Amendment is simply declaratory of our system of dual sovereignty of state and nation; it does not operate as a limitation upon the powers, express or implied, of the national government. *United States* v. *Darby,* 312 U. S. 100, 123–124. In order for that provision to be at all germane it is necessary to find that Congress has attempted to exercise a power not committed to it.

The materials earlier referred to herein, *supra,* pp. 13–17, should, however, dispel conclusively any notion that the 1942 amendments represent a deliberate intrusion by Congress into a sphere reserved for the states. It cannot properly be said that there has been even an unintentional interference with the power of the states to regulate marital property rights in whatever manner they choose. The powers of the husband and the rights of the wife remain those which the state law ordains. Congress has done no more than, taking those rights as the state has distributed them, to levy its taxes in recognition of the fact that they have been so distributed. The power of

the state to regulate the marital property relationship is not impaired any more than its power to regulate the devolution of property is impaired by the estate tax in general. We think therefore that it cannot be said that the 1942 amendments derogate in any sense from the power of the state or from the rights of the individuals as the state has conferred them.

We note, however, that it has been asserted that the amendments will necessarily result in the abandonment in this country of the community property system. This is pure conjecture. There is not only no substantial basis for the claim that the community property states will be at a disadvantage taxwise, but there is no reason to assume that any such disadvantage would result in the abandonment of that system. The teachings of our history are to the contrary. The existence of tax disadvantages in the common law states following the decision in *Poe* v. *Seaborn*, 282 U. S. 101, did not cause them to adopt the community property system,[56] and there is no more reason to expect that the community prop-

[56] The only instances of such a change have been the adoption by Oklahoma in 1939 of an elective community property law, and by Oregon in 1943 of a similar law. After the decision in *Commissioner* v. *Harmon*, 323 U. S. 44, that such an elective law did not affect the incidence of the federal income tax, Oklahoma adopted a new law which does not contain the elective feature (Act of April 28, 1945) and the Oregon statute was repealed entirely (Act of March 20, 1945).

erty states would now adopt the common law system.

We do not believe therefore that the case presents in any sense a collision between state and federal power, but even if that should be thought to be an issue here, the answer is plain. The framers anticipated and provided the answer for such questions in the supremacy clause of the Constitution, "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield". *Florida* v. *Mellon,* 273 U. S. 12, 17; *Sonzinsky* v. *United States,* 300 U. S. 506, 514.

CONCLUSION

The judgment of the court below is erroneous and should be reversed.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX A

Constitution of the United States:

Article 1

Section 2.

*   *   *   *   *

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, * * *

*   *   *   *   *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

*   *   *   *   *

Section 9.

*   *   *   *   *

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(e) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the

decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(g) *Proceeds of Life Insurance.*—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 402. COMMUNITY INTERESTS.

* * * * *

(b) *General Rule.*—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof

"(e) *Joint and Community Interests.*—

"(1) *Joint Interests.*—"

(2) By inserting at the end thereof the following new paragraph:

"(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

* * * * *

(26 U. S. C. 1940 ed., Supp. IV, Sec. 811.)

SEC. 404. PROCEEDS OF LIFE INSURANCE.

(a) *General Rule.*—Section 811 (g) (relating to life insurance) is amended to read as follows:

"(g) *Proceeds of Life Insurance.*—

"(1) *Receivable by the Executor.*—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

"(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under

policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purpose of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

* * * * *

"(4) *Community property.*—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

(26 U. S. C. 1940 ed., Supp. IV, Sec. 811.)

SEC. 411. LIABILITY OF CERTAIN TRANSFEREES.

(a) *Imposition of Liability.*—Section 827 (b) is amended to read as follows:

"(b) *Liability of Transferee, Etc.*—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth."

(b) *Definition of Transferee.*—Section 900 (e) is amended to read as follows:

"(e) *Definition of 'Transferee'.*—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee, and includes a person who, under section

827 (b), is personally liable for any part of the tax."

(26 U. S. C. 1940 ed., Supp. IV, Sec. 827.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.41 [as amended by T. D. 5408, 1944 Cum. Bull. 578] *Deduction of the value of transfers previously taxed.*—If there is included in the decedent's gross estate property received by him by gift from any person, within five years prior to his death, or received by gift, bequest, devise, or inheritance from any person who died within five years prior to his death, or property acquired in exchange for property so received, the Internal Revenue Code authorizes a deduction in respect thereof, subject to the following conditions and limitations, namely:

(a) *Conditions.*—

(1) The property respecting which the deduction is sought must have been received by the decedent as a gift within five years prior to his death, or received by him by gift, bequest, devise, or inheritance from a prior decedent who died within five years of the decedent's death. Notwithstanding the designation by local law of the capacity in which the decedent takes, for the purposes of this deduction, property received by gift, bequest, devise or inheritance includes property, or rights with respect to property, held by or devolving upon the decedent as spouse under dower or curtesy laws or laws creating an estate in lieu of dower or curtesy, as spouse under community property laws, as tenant of a

tenancy by the entirety or joint tenancy with survivorship rights, as donee (possessor) of a power of appointment, as appointee under the exercise of a power of appointment, as remainderman under the release or nonexercise of a power of appointment, or as beneficiary of life insurance.

T. D. 5239, 1943 Cum. Bull. 1081:

In order to conform Regulations 105 [Part 81, Title 26, Code of Federal Regulations, 1942 Sup.] to certain sections of the Revenue Act of 1942 (Public law 753, Seventy-seventh Congress), approved October 21, 1942, and to the Joint Resolution of December 17, 1942 (Public law 809, Seventy-seventh Congress), such regulations are amended as follows:

* * * * *

PAR. 14. Section 81.23 is amended to read as follows:

SEC. 81.23. Community Property.—In the case of estates of decedents dying after October 21, 1942, the gross estate includes the entire community property held by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. Section 811 (e) (2) also provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject

to the decedent's power of testamentary disposition.

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes any property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner. The burden of identifying the property which may be excluded from the community interest rests upon the executor.

* * * * *

PAR. 19. Section 81.27 is amended to read as follows:

SEC. 81.27. *Insurance Receivable by Other Beneficiaries.*—(a) *In case of decedent dying after October 21, 1942.*—

* * * * *

For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the

decedent's spouse or derived originally from such compensation or from separate property of such spouse. With respect to the meaning of property derived originally from such compensation or from separate property of the decedent's spouse, referred to in the preceding sentence, and to the identification required, see section 81.23.

APPENDIX B

H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35–37, 160 (1942–2 Cum. Bull. 372, 401):

* * * * *

3. *Community Interests*

For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband. The difference in the amount of the Federal estate tax is enormous as shown by the following tables:

* * * * *

It will be noted from the above table that in some instances there is an entire exemption from the Federal estate tax for the reason that the omission of one-half of the community property reduces the husband's net estate below the minimum exemption of $40,000. Moreover, this halving of community property greatly reduces the estate tax because of the progressive rates. For example, under the present law, a net estate of $50,000 will pay an estate tax of $500 in a non-community-property State

and no tax in a community-property State. An estate of $100,000 will pay a tax of $9,500 on the death of the husband in a non-community-property State and a tax of $500 on the death of the husband in a community-property State.

If the wife dies within 5 years of her husband, the remaining $50,000 upon which the husband paid no estate tax will be subject to an estate tax of $500. Thus, the total tax paid on this $100,000 estate in the community-property State will be $1,000 as compared with $9,500 in the non-community-property State or a tax saving of $8,500. In the case of a $5,000,000 estate, the tax saving in a community-property State will amount to as much as $485,800 and in the case of a $10,000,000 estate, the tax saving in a community-property State will amount to as much as $1,171,800.

Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. This follows somewhat the treatment which is accorded to joint estates under the existing law. The existing statute has been upheld by the Supreme Court in numerous cases.

* * * * *

SECTION 402. COMMUNITY INTERESTS.

This section eliminates special estate tax privileges enjoyed by residents of community property jurisdictions by amending section 811 (e) of the Internal Revenue

Code. A new paragraph (2) is added after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. The amendment thus makes due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor, subject, however, to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of appor-

tionment. State presumptions are therefore not operative against the Commissioner.

* * * * *

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231-232 (1942-2 Cum. Bull. 504):

SECTION 402. COMMUNITY INTERESTS.

This section, which corresponds to section 402 of the bill passed by the House, eliminates special estate tax privileges enjoyed by virtue of the community property system. The corresponding section of the House bill amended only section 811 (e) of the Code, relating to joint interests. Your committee bill adds an amendment to section 811 (d) relating to revocable transfers. A new paragraph (5) is added to section 811 (d), providing that for the purposes of section 811 (c) and (d), a transfer of property held as community property by the decedent and surviving spouse shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. A new paragraph (2) is added to section 811 (e) after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Such paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving

spouse or derived originally from such compensation or from separate property of the surviving spouse.

The amendments thus make due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor. Section 811 (e) (2), however, is subject to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

APPENDIX C

Louisiana Civil Code (Dart, Second Ed.), Vol. 1:

Art. 150. *Fraudulent debts and conveyances of husband.*—From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

* * * * *

Art. 1493. *Disposable portion—Legitimate children left surviving.*—Donations inter vivos or mortis causa can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number.

Under the name of children are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent.

Art. 1494. *Disposable portion—Parent or parents surviving.*—Donations inter vivos or mortis causa can not exceed two-thirds of the property, if the disposer, having no children, leave a father, mother or both.

Art. 1495. *Forced heirs defined—Disinheritance.*—In the cases prescribed by the

two last preceding articles, the heirs are called forced heirs, because the donor can not deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them.

* * * * *

Art. 1621. *Children—Disinheritance—Grounds.*—The just causes for which parents may disinherit their children are ten in number, to-wit:

1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient.
2. If the child has been guilty, towards a parent, of cruelty, of a crime or grievous injury.
3. If the child has attempted to take the life of either parent.
4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them, when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents.

Art. 1622. *Descendants — Ascendant's right to disinherit.*—The ascendants may

disinherit their legitimate descendants, coming to their succession, for the first nine causes expressed in the preceding article, when the acts of ingratitude there mentioned have been committed towards them, instead of towards their parents; but they cannot disinherit their descendants for the last cause.

ART. 1623. *Parents — Disinheritance by children—Grounds.*—Legitimate children, dying without issue, and leaving a parent, can not disinherit him or her, unless for the seven following causes, to-wit:

1. If the parent has accused the child of a capital crime, except, however, the crime of high treason;

2. If the parent has attempted to take the child's life;

3. If the parent has, by any violence or force, hindered the child from making a will;

4. If the parent has refused sustenance to the child in necessity, having the means of affording it;

5. If the parent has neglected to take care of the child while in a state of insanity;

6. If the parent has neglected to ransom the child when in captivity;

7. If the father or mother have attempted the life, the one of the other, in which case the child or descendant making a will may disinherit the one who has attempted the life of the other.

* * * * *

Louisiana Civil Code (Dart, Second Ed.), Vol. 2:

ART. 2332. *Community of acquets or gains—Modification or abrogation by agreement.*—The partnership, or community of acquets or gains, needs not to be stipulated;

it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

* * * * *

ART. 2334. *Separate and common property of spouses.*—The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it can not be mortgaged or sold by the husband without her written authority or consent. [As amended, Acts 1912, No. 170; 1920, No. 186.]

ART. 2335. *Separate property of wife*—

Dotal and paraphernal property.—The separate property of the wife is divided into dotal and extradotal.

Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment.

Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry.

ART. 2337. *Dowry—Meaning of term.*—By dowry is meant the effects which the wife brings to the husband to support the expenses of marriage.

* * * * *

ART. 2347. *Husband-Rights in dowry.*—The dowry is given to the husband for him to enjoy the same as long as the marriage shall last.

* * * * *

ART. 2349. *Income property of husband—Use—Purposes.*—The income or proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, that of their children, and other expenses which the husband deems proper.

ART. 2350. *Administration of dowry by husband—Powers.*—The husband alone has the administration of the dowry, and his wife cannot deprive him of it; he may act alone in a court of justice for the preservation or recovery of the dowry, against such as either owe or detain the same, but this does not prevent the wife from remaining the owner of the effects which she brought as her dowry.

* * * * *

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Art. 2354. *Dowry consisting of movable effects—Ownership—Liability of husband.*—If the dowry, or part of it, should consist in movable effects, valued by the marriage contract without declaring that the estimated value of the same does not constitute a sale, the husband becomes the owner of such movable effects and owes nothing but the estimated value of the same.

* * * * *

Art. 2367. *Dissolution of marriage—Restoration of dotal property—Movables—Wife not divested of title.*—If the dowry consists of immovables, or if it consists of movables not valued by the marriage contract, or valued with the declaration that the valuation is not intended to divest the wife of her property in the same, the husband or his heirs may be compelled to restore the same without delay, after the dissolution of marriage.

* * * * *

Art. 2376. *Legal mortgage and privilege of wife—Movables and immovables.*—The wife has a legal mortgage on the immovables, and a privilege on the movables of her husband, to-wit:

1. For the restitution of her dowry, as well as for the replacing of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband, and this from the time of the celebration of the marriage.

2. For the restitution or the replacing of the dotal effects, which she acquired during the marriage, either by succession or by donation; from the day when such succession devolved to her, or such donation began to have its effect.

* * * * *

ART. 2383. *Definition.*—All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal.

ART. 2384. *Wife's right to administer.*—The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

ART. 2385. *Wife failing to administer paraphernal property—Management by husband.*—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. *Fruits of paraphernal property—Ownership—Reservation by wife.*—The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by a written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a notary public and two witnesses and duly recorded in the conveyance records of the parish where the community is domiciled.

If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the

things which produce them. [As amended, Acts 1871, No. 87; 1944, No. 286, § 1.]

ART. 2387. *Wife—Assumption of administration of paraphernal property.*—The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

ART. 2388. *Husband administering paraphernal property—Accountability.*—The husband, who administers the paraphernal property of his wife, notwithstanding her formal opposition, is accountable to her for all the fruits, as well those existing as those which have been consumed.

* * * * *

ART. 2391. *Wife—Action for restitution of paraphernal effects.*—The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits, as above expressed.

ART. 2392. *Stipulation against marital partnership.*—Married persons may stipulate that there shall be no partnership between them.

* * * * *

ART. 2399. *Community of acquets and gains—Stipulation against required.*—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

* * * * *

ART. 2402. *Property forming community—Personal injuries to wife.*—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoy-

ment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." [As amended, Acts 1902, No. 68.]

ART. 2403. *Community and individual debts.*—In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404. *Husband master of community—Gratuitous and fraudulent conveyances.*—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos,*

by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. [As amended, Acts 1926, No. 96.]

ART. 2405. *Community presumed on dissolution of marriage.*—At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

ART. 2406. *Dissolution of marriage—Division of community.*—The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has

been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

* * * * *

ART. 2408. *Increase or improvement of separate property during marriage—Division—Unearned increment—Separate property improved at expense of community.*—When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

ART. 2409. *Debts contracted during marriage—Liability.*—It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

ART. 2410. *Wife or her heirs or assigns—Renunciation of community—Exoneration from debts.*—Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

ART. 2411. *Wife renouncing community—Effect.*—The wife, who renounces, loses

every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412. *Wife—Active concern in community — Renunciation prohibited.* — The wife who has taken an active concern in the effects of the community, cannot renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413. *Wife—Preservation of power to renounce — Inventory.* — The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

* * * * *

ART. 2423. *Death of wife—Renunciation of community by heirs.*—In case of the dissolution of the marriage by the death of the wife, her heirs may renounce the partnership or community of gains, within the term and according to the forms which the law prescribes to the surviving wife.

ART. 2424. *Modification of legal community by contract.*—Married persons may, by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property, belonging to either of them, of which the fruits shall not enter into the partnership.

ART. 2425. *Wife's right to petition for separation of property.*—The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to

the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

ART. 2426. *Dotal effects of wife—Failure of husband to reinvest.*—The neglect to reinvest the dotal effects of the wife, in cases where the law directs such reinvestment, is also sufficient cause for the wife to demand a separation of property.

ART. 2427. *Judicial decree essential.*—The wife must petition for the separation of property, and it can only be ordered by a court of justice, after hearing all parties. It can, in no case, be referred to arbitration.

Every voluntary separation of property is null, both as respects third persons and the husband and wife between themselves.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 58

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE,

Appellant,

v.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER

Appellees.

On Appeal from the District Court of the United States For the Eastern District of Louisiana.

BRIEF FOR THE APPELLEES.

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BRIEF FOR THE APPELLEES.

INTRODUCTION

The decision below (R.12) is reported in 60 Fed. Supp. page 169.

The case comes here on direct appeal from a judgment of the District Court for the Eastern District of Louisiana (50 Stat. 751). Probable jurisdiction has been heretofore noted (R.23).

The sole questions involved are the constitutionality of Section 402(b)(2) and of Section 404(a) of the Federal Revenue Act of 1942; both of which provisions were held by the District Court to be in conflict with

the due process clause of the Fifth Amendment to the Federal Constitution (R.19). The appellees contend that this constitutional infirmity proceeds not only from conflict with the Fifth Amendment, but also because the statute is violative of Section 8 of Article I of the Constitution and of the Tenth Amendment.

THE STATUTE INVOLVED

The provisions of the Federal Revenue Act of 1942 whose constitutionality is the issue here, are amendments to Section 811 of Title 26 of the United States Code. These provisions (56 Stat. 942), so far as they relate to the issues of this case, are as follows:

> (b) General Rule. — Section 811 (e) (relating to joint interests) is amended as follows:
>
> (1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof
>
> "(e) **Joint and Community Interests.**—
>
> "(1) Joint Interests.—"
>
> (2) By inserting at the end thereof the following new paragraph:
>
> "(2) **Community Interests.** — To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Sec. 404. **Proceeds of Life Insurance.** (a) General Rule. — Section 811 (g) (relating to life insurance) is amended to read as follows:

"(g) Proceeds of Life Insurance.—

"**(1) Receivable by the Executor.**—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

"(2) **Receivable by other beneficiaries.**—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, **or** (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the puposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

* * *

"(4) **Community property.** For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, ex-

cept such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

STATEMENT OF THE CASE

The action was brought below by the universal legatees, and hence the sole heirs of Sam Wiener, Jr., a citizen of Louisiana, who died there subsequent to the enactment of the statutory provisions whose constitutionality is here at issue.

Mr. Wiener's succession having no debts of any consequence, no administration was had; but the appellees were, by judgment of the proper probate court, sent into possession of all of the property of the decedent (R.8), and thereafter proceeded, as required by law, to file their estate tax return. In that return, they intentionally disregarded the statutory provisions here in controversy: returning only that which they had inherited under the local law. A deficiency assessment was later proposed by the Bureau of Internal Revenue based upon the inclusion in the taxable net estate, of the total value of all the property of the marital community that had existed under the laws of Louisiana between the decedent and his surviving wife.

That deficiency assessment was paid, and this suit, after rejection of claim for refund, was brought against the Collector of Revenue, to whom payment had been made, for recovery back of these additional taxes which had been paid solely to prevent the accumulation of penalties (R.10). The case was submitted to the District

Court upon an agreed statement of facts (R. 7 et seq), which was adopted by the District Court as its findings (R.19). Upon the basis of these facts, the District Court concluded that the statutory provisions at issue were violative of the Fifth Amendment and, therefore, void; and for that reason entered judgment for plaintiff (R.19) for the amount sued for.

SUMMARY OF ARGUMENT

The controlling facts are stipulated (R.8):

> "The said decedent was married in 1907, in Shreveport, to Florence Loeb, with whom he lived in that relation until his death.
>
> "During the marriage, said Sam Wiener, Jr. was engaged in many different kinds of business, such as the grocery business, lumber business, real estate and later, in investments of various character. All assets of every character, movable and immovable, which stood of record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside of the household, nor did she receive from anyone salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener."

The marital community is "traditional" in Louisiana. It is "a system dictated by state policy as an incident of matrimony", *Commissioner of Internal Revenue v. Harmon,* 323 *U. S.* 44. As part of the social and economic system of the State, it not only long antedates the Sixteenth Amendment, but the Constitution itself. Al-

ways, it has underlain the family law and hence the social order of the State. Under the local law, all earnings and all assets (with the exception of certain acquisitions acquired by gratuitous, as opposed to onerous title), whether nominally in the name of one or the other of the spouses is, as an incident of the marital relation, an acquet of the two partners as equal co-owners or tenants in common.

Succession of Wiener, 203 La. 649, 666, and cases cited.

In *Bender v. Pfaff*, 282 U. S. 127, 132, this Court, in speaking of the community relation, pointed out:

> "The wife has a present vested interest in community property equal to that of her husband",

and that (131):

> "Each spouse may by will dispose of only his or her one-half of the community, and is powerless to affect the other's half. In case of death intestate one-half descends to the heirs of the decedent and the other spouse is powerless to prevent this."

Furthermore, this Court noted that its decision in *Warburton v. White*, 176 U. S. 484, and in Arnett v. *Reade*, 220 U. S. 311, had been cited by the Supreme Court of Louisiana

> "indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine."

(1) Based upon the settled law of Louisiana that husband and wife each owns by the very fact of acquisition during the marriage an undivided one-half interest in every asset of the community, it is the contention of

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the appellees that a statute which purports to measure by the value of the whole, the tax upon the transmission of title to an undivided one-half interest, is arbitrary and capricious and, hence, is violative of the due process of law guaranteed by the Fifth Amendment. *Hoeper v. Tax Commission*, 284 U. S. 206; *Knowlton v. Moore*, 178 U. S 41; *Nichols v Coolidge*, 274 U S 531; *Heiner v. Donnan*, 285 U. S. 312.

Manifestly, if to justify the constitutional validity of the statute, resort be had to a disregard or modification of the law of the State relating to the property rights or incidents thereof of the partners in the marital community, such result would be to impute to Congress an attempt to interfere with what is essentially a reserved right of the states; namely, to define and regulate the ownership of property of its citizens and located within its limits. See observation of the Court in *Pennoyer v. Neff*, 95 U. S. at page 722. This would be squarely in the teeth of the Tenth Amendment.

Indeed, the framers of the original Constitution never contemplated that any such power could exist in the Federal Government which they were to form. See *The Federalist*, No. 31.

The law of the State is that, as interpreted by its highest Court. *Erie Railway Co. v. Tompkins*, 304 *U. S.* 64.

The attempt in the statute to classify the community partnership through analogy to the tenures known as "tenancy by the entirety" and "joint tenancy" is utterly wanting in merit. In each of these cases, the former tenure is converted into the sole ownership of the survivor by the mere fact of the death of one of the spouses.

In the case of the community in Louisiana, the hus-

band owns an undivided one-half and the wife the other undivided one-half. Hence, their relation is legally that known at common law as "tenants in common". Each may transmit at death, testate or intestate, only that undivided one-half interest which had been owned by the decedent at the instant of termination of the marital partnership. Manifestly, an attempt to impose a tax upon the transmission by death of the title of an ordinary tenant in common based upon the value of the whole of the property, would fail under the due process clause. Yet, that is the exact analogy here.

In the two cases upon which the Solicitor General relies (based, in the one instance upon a tenancy by the entirety, and in the other, the case of a joint tenant, to-wit, *Tyler v. United States*, 281 *U. S.* 497, and *United States v. Jacobs*, 306 *U. S.* 363), the tenure in each case had been gratuitously created. In each case, the right of Congress to tax might well have proceeded upon its power to levy the exaction upon all such anticipatory tax-avoiding arrangements.

Moreover, as pointed out in both cases, "the grand incident" of each tenure, upon which this Court justified the right to measure the tax upon the value of the whole property was "survivorship"; i. e. the acquisition of entire and unconditional ownership by the survivor merely through the fact of death of the other owner. The economic benefit in such case was through the devolution of title. There is no survivorship in the community property law of Louisiana: the title of the deceased partner passes to the legal heirs in intestacy and is completely subject to the power of testamentary disposition. Hence, there is no shifting of title in favor of the survivor in the case of the death of a member of the community partnership.

The Solicitor General contends that the statute may be saved, because the death of the husband puts an end to that power of management and control which he possessed during the existence of the community partnership. Manifestly, however, one gains no economic benefit by the loss of a chosen agent. This Court has previously pointed out (*Poe v. Seaborn*, 282 U.S. 101, 113) that the husband's power of management "by no means negatives the wife's present interest as a co-owner". The Supreme Court of Louisiana in *Succession of Wiener, supra*, page 669, likens the marital partnership to a

> "limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract."

That such managerial powers do not constitute property rights was long ago held by this Court, *Warburton v. White, supra*, quoted in *Poe v. Seaborn, supra*, page 112, and this Court was careful to point out in *Bender v. Pfaff, supra*, page 132, that the limitations upon the husband's power are more stringent in Louisiana, where unfaithful or dissolute management entitles the wife to "bring about an immediate dissolution and liquidation of the community property". See, also, *Reinecke v. Northern Trust Co.*, 278 U. S. 339 (367).

Nothing in *Moffitt v. Kelly*, 218 U. S. 400, is authority for a different conclusion. The Court there was careful to point out

> "The nature and character of the right of the wife in the community for the purpose of taxation

was peculiarly a local question which we have no power to review".

See *Coolidge v. Long*, 282 U. S. 582, 600.

However, if the disappearance of the husband's power of management by reason of his death could be said to constitute an economic benefit to the wife, it would necessarily follow that the death of the wife (which, of course, operates to deprive the husband of all power of management and control over his wife's half) could not be an economic benefit to him. One does not benefit by the loss of a right.

Yet, the statute bases the tax upon "the interest therein held as community property by the 'decedent' and 'surviving spouse' ". The statute makes no reference to "husband" nor to "wife". Either "decedent" or "surviving spouse" may be husband or wife. The Act carefully refrains from any mention of gender. The statute, therefore, applies equally in either case; i. e. of the predecease of husband or of wife. It does not permit of separation and must stand or fall as a whole.

On pages 68 to 74 of this brief are collated the multitude of cases from this Court sustaining the doctrine so concisely stated by Mr. Justice Holmes in *United States v. Ju Toy*, 198 U. S. 253, 262:

> "The relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

(2) The Statute violates the uniformity clause of Section 8 of Article I of the Constitution.

Under its own express terms, the statute refrains from operation in respect of any tenancy in common other than that which constitutes community property "under the law of any state, territory or possession of the United States".

Other similar common ownerships and partnerships are left free from the effect of the taxing statute. It is only where the partnership is created by the law of a particular state or territory that the statute operates. Its effect is, therefore, carefully and avowedly limited to operation upon that class of tenancies in common known as community partnership property, when that partnership is the result of the law of any of the eight traditional community property states. By its own terms, it has no effect upon tenants in common in the other forty states.

Estate taxes, being excises, must be uniform throughout the United States. The statute here is void, therefore, as lacking in geographical uniformity.

It would seem, moreover, that the incidence of the tax upon the surviving spouse growing out of exaction upon property owned before the death of the decedent, would be a direct tax and hence, not being apportioned according to population, would be void under Clause 3, Section 2, and under Clause 4 of Section 9 of Article I of the Constitution. Such is specially pleaded.

(3) Section 404(a) of the Revenue Act is assailed upon the identical grounds upon which the attack is leveled on Section 402(b)(2). This, because there had been included in the deficiency assessment the proceeds of life insurance taken out by the deceased during the marriage, and paid for with community funds, with the wife as beneficiary (R.8).

The law of Louisiana is that such policies are community property, and the proceeds payable at death likewise an asset of the community. *Succession of LeBlanc*, 142 La. 27; *Berry v. Franklin State Bank*, 186 La. 623, 635, and cases cited. This jurisprudence is recognized in *Howard v. United States*, 125 Fed.(2d) 986. Compare *Lang v. Commissioner*, 304 U. S. 264 In view of the settled State law, the same arguments as to community property generally are applicable to the proceeds of life insurance belonging to the community partnership.

ARGUMENT

In demonstrating the invalidity of the Federal Statute here in question (Section 402 (b) of the Revenue Act of 1942), we desire briefly to review the nature and sources of community partnership property in Louisiana and then analyze the statute itself. When the statute is considered against the background of the community partnership systems to which it is addressed, its arbitrary, capricious and discriminatory character becomes apparent.

NATURE OF COMMUNITY PARTNERSHIP PROPERTY

The nature of community partnership property is well known to this Court. It was summarized by this Court in *Bender vs. Pfaff*, 282 *U. S.* 127, which dealt with the Louisiana community partnership system; and also by the highest court of Louisiana in the *Succession of Wiener*, 203 *La.* 649, 14 *So. 2d* 475, decided June 21, 1943, and is explained and established in the Articles of the Louisiana Civil Code and numerous other Louisiana

Supreme Court decisions.[1] These opinions are controlling as to the property interest owned by the husband and the surviving spouse during his lifetime, and at the time of his death, and as to the rights which terminated at the husband's death. As detailed in the Articles of the Louisiana Civil Code and in these opinions, the property rights of the husband and surviving wife in the community partnership property may be summarized as follows:

1. Every marriage contracted in Louisiana, by virtue of the provisions of the Louisiana Civil Code, as interpreted by the Supreme Court of Louisiana, superinduces of right a partnership between husband and wife.

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[1]See also *Phillips v. Phillips*, 160 La. 813, 107 So. 584; *Dixon's Executors*, 4 La. 188; *Theall v. Theall*, 7 La. 226; *Succession of Wiener*, 203 La. 649, 14 So. (2d) 475; *Bender v. Pfaff*, 282 U.S. 127; *Succession of Marsal*, 118 La. 212; *Succession of May*, 120 La. 692; *Leibman v. Fontenot*, 275 F. 688; *Warburton v. White*, 176 U.S. 484; *Arnett v. Reade*, 220 U.S. 311; *Childers v. Johnson*, 6 La. Ann. 634 at p. 641; Louisiana Revised Civil Code Arts. 2404, 2399, 2402, 2334, as amended by Act 170 of 1912 and Act 186 of 1920, 2386, 2385, 2406, 140 to 161, inclusive, 160, as amended by Act 21 of 1928, 2425 to 2437, inclusive, 2403, 2408, 915, 916, 123, 136, 138, 149, 150, 155, 159, 2446, 2329, 1790, 1749; *Melady v. Succ. of Bonnegent*, 142 La. 534; *Bister v. Menge*, 21 La. Ann. 216; *Radovich v. Jenkins*, 123 La. 355; *Snowden v. Cruse*, 152 La. 144; *Ramsey v. Beck*, 151 La. 190; *Succ. of Moore*, 42 La. Ann. 331, at p. 341; *Smallwood v. Pratt*, 3 Rob. 132; *Davock v. Darcy*, 6 Rob. 342; *Glenn v. Elam*, 3 La. Ann. 611; *Dillon v. Treville*, 129 La. 1005; *Succ. of Casey*, 130 La. 743; *Succ. of Goll*, 156 La. 910; *Lob's Sons v. Karnofsky*, 177 La. 229, 148 So. 34; *Succ. of Hayes*, 33 La. Ann. 1143; *Succ. of Moore*, 40 La. Ann. 531; *Bossier v. Herwig*, 112 La. 539; *Brooks v. House*, 168 La. 542; *Burton v. Brugier*, 30 La. Ann. 478; *Webre v. Lorio*, 42 La. Ann. 178; *Coreil's Estate*, 137 La. 702; *Dillon v. Dillon*, 35 La. Ann. 92; *Succ. of Lebesque*, 137 La. 567; *Crochet v. Dugas*, 126 La. 285; *Williams v. Goss*, 43 La. Ann. 868; *McClelland v. Gasquet*, 122 La. 241; *Hill v. Hill*, 115 La. 490; *White v. White*, 153 La. 313, 159 La. 1065; *Lockhart v. Dicey*, 161 La. 282; *Nichols v. Her Husband*, 7 La. Ann. 263; *Ford v. Kittredge*, 26 La. Ann. 190; *Houghton v. Hall*, 177 La. 237, 148 So. 37; *Succ. of Howell*, 177 La. 276, 148 So. 48; *Hellberg v. Hyland*, 168 La. 493; See also authorities and statutes quoted in brief for respondent in the Supreme Court of the United States in the matter of *Jacob O. Bender v. William Pfaff*, Docket No. 86, October term, 1930, 75 L. Ed. 252, 282 U.S. 127 to 132, filed on behalf of respondent and Louisiana taxpayers, by Charles E. Dunbar, Jr., and Monte M. Lemann of New Orleans, pages 23 to 43, inclusive; Opinions of Acting Attorney General Mitchel in 1927, and Opinions of Attorney General Daugherty in 1924; Attorney General Stone in 1924, and Attorney General Sargent in 1926; see 32 Op. Att. Gen. 298, 435; 34 Ibid. 376, 395; 35 Ibid. 89, 265; General Counsel Memorandum, 6351; 32 Op. Att. Gen. 435; T.D. 2090, 2137, Of. Dec. No. 246, reported at 2 C.B. 198, T.D. 3071, reported at 3 C.B. 221; and T.D. 3138.

This community partnership is a partnership in which the husband and wife own equal shares, the title of each spouse thereto vesting at the very instant such property is acquired by the community partnership.

2. The Louisiana Supreme Court has repeatedly announced that the theory and policy of the Civil Law is that the acquisition of all property (with certain exceptions such as property acquired by gift, devise or inheritance) during the marriage "is due to the joint or common efforts, labor, industry, economy and sacrifice of the husband and wife; in her station the wife is just as much an agent in acquiring this property as is her husband." (*Succession of Wiener, supra.*)

3. The wife is an equal owner (tenant in common) with her husband in all of the community partnership property. The wife's rights, interest and title are equal to the husband's and are of equal dignity.

4. The wife's right in and to half of the community partnership property does not rest upon any **gratuity** of her husband; she earns it and is owner of this property, because the law of Louisiana vests her with ownership of it at the time of its acquisition by the community partnership.

5. The wife does not take her title through or under the husband; he never earned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition by the community partnership and she continued uninterruptedly to hold such title so long as the property remained an asset of the community.

6. The husband owned no interest in the wife's portion of the partnership property when the community partnership terminated with his death. Her portion

of the community partnership assets is not subject to the payment of his debts and he cannot and did not dispose of it by will. Upon his death, his one-half passes to his heirs or legatees; she simply retains the equal interest in the property which she owned as a tenant in common prior to her husband's death.

7. The relationship is analogous to a limited commercial partnership at common law in which the husband and wife are equal half partners. The husband, invested with management by the fact of marriage and by statute, stands in the same category as a contractual managing partner or agent in common law states. As the Supreme Court of Louisiana in the *Succession of Wiener, supra,* has said: "There is no substantial difference between her (the wife's) interest therein and the interest of an ordinary member of a limited partnership, the control and management of whose affairs, has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract", and as this Court has said in *Poe v. Seaborn, supra*: "the powers of partners, or of trustees of a spendthrift trust, furnish apt analogies."

8. The husband is expressly denied, by statute, the right to give away, dispose of, or deal with the community partnership property or income in fraud of his wife's property rights in half of the community partnership and community income. If the husband, as fiduciary and managing partner, is a dishonest manager or disposes of the community property in fraud of his wife's rights, the wife has the right at any time during marriage (without obtaining a separation or divorce) to have the com-

munity partnership dissolved, to have a partition of the community property and the delivery to her of her half interest, and in the same dissolution and partition proceeding, the husband is accountable and must reimburse the wife for any loss which she has sustained as owner of one-half of the community partnership by reason of the husband's violation of his fiduciary obligations.

9. If the husband proves to be a wasteful, bad, or incompetent manager and agent, or if his financial affairs are in such disorder as to jeopardize the wife's half interest in the community partnership or her future acquisitions or earnings, she likewise has the right to a separation of property and a partition of the community partnership and the delivery to her of her half interest and, as in the case of fraud, the husband is accountable to the wife in the same proceeding for any losses she may have sustained as a result of the violation of his obligations.

10. If the husband, in violation of his fiduciary obligation as manager of the community partnership, uses any part of the community partnership property or income for the benefit of his separate estate, he becomes a debtor to the community and must reimburse the community partnership estate.

11. If the husband pays his separate debts out of the community partnership funds, he must reimburse the community partnership the amount so paid.

12. The husband has testamentary disposition over his half of the community partnership property and the wife enjoys full power of testamentary disposition over her half interest in the property. She can will it to whom she chooses, even to her **paramour**, and her husband is powerless to prevent it.

13. At the husband's death, without a will, his half of the community partnership property passes to his heirs. Similarly at the wife's death, without a will, her interest passes to her heirs-at-law, even though those heirs be illegitimate children by another man, and her husband is powerless to prevent such inheritance.

14. In the case of a judicial separation without divorce, the wife again has the right to a liquidation of the partnership and the partition and the delivery to her of her half interest.

15. In the case of a divorce, the community partnership is dissolved and partitioned and the wife has the right to her one-half interest, even though she be guilty of the grossest sort of misconduct, such as adultery, and the Court is powerless to deliver to her any less than her full one-half interest. The right of the wife in this connection is independent of any question of fault or alimony, which is governed and regulated by separate statutes. The wife's right in the event of divorce, to remove the husband as manager of the community partnership and have the partnership dissolved and liquidated and to receive immediately one-half of the community partnership property and income results from the fact that in Louisiana she is the owner, as tenant in common, of one-half of the community partnership property and income.

16. The wife's one-half interest is subject to the payment of her one-half of the community debts incurred during the existence of the community partnership.

17. The husband and wife in Louisiana each own an undivided one-half in each and every asset of the community partnership property and income as "tenants in common" as contradistinguished from "joint tenants" or "tenants by the entirety" as the last two mentioned

legal tenures are defined and known in common law states.

18. The wife is liable for income taxes on the property which represents her one-half of the community partnership income.

19. At the wife's death, her legatees or heirs are liable for Louisiana Inheritance Taxes for the privilege of receiving her half interest in the community partnership property.

20. At the wife's death, her estate, prior to the 1942 amendment, was liable for the Federal Estate Taxes imposed on the privilege of transmitting her half interest in the partnership property at death.

The above partial summary clearly shows that both in law and fact the wife in Louisiana is the actual owner of a full one-half undivided interest in the community partnership property, and is possessed of all of the legal incidents of ownership. The limited, safeguarded and permissive management granted to her husband is that of a managing partner. The husband's interest as managing partner is not a beneficial interest. It is that of a fiduciary and is limited both in scope and duration. While the husband may, as agent or manager, invest and reinvest the proceeds of any sale of community partnership property, any property so acquired immediately becomes community partnership property in which his wife possesses a full one-half interest. His management of her interest in the property terminates upon separation, upon divorce, upon a showing of fraud, or even upon a showing of bad or incompetent management or when his financial affairs are in disorder and the wife's property rights are endangered. The wife possesses the entire bundle of rights that go to make up actual ownership of property. The

husband possesses only limited managing powers as agent, or managing partner for his wife.[2]

Prior to the Estate Tax Amendment in the Revenue Act of 1942, the Estate Tax was applied to community partnership property in the same way that it was to all other property: the tax was measured by the value of the property which passed by reason of the death of the decedent. In no case was the tax measured by property which the decedent did not own at death, and which the decedent had never owned. Under the prior law, since each spouse in a community partnership property state owns one-half of the community partnership estate, and the survivor's one-half is not derived from and had never been owned by the decedent, the Federal estate tax imposed upon the estate of the first to die, whether husband or wife, was measured by the value of decedent's one-half of the community partnership estate. Upon the survivor's death, the survivor's half of the property was similarly taxed. Thus the property interest of each spouse in the community was taxed on the same basis as the property of any other decedent. (T. D. 2450, T. D. 3138, T. D. 3670).[3]

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[2]Rules in the other several community property states are substantially the same with some minor variations. See *Poe v. Seaborn*, 282 U.S. 101 (Wash.) *Jacob O. Bender v. Wm. Pfaff*, 282 U.S. 127 (La.); *Fred O. Goodell v. O. B. Koch*, 282 U.S. 118 (Ariz.); *Hopkins v. Bacon*, 282 U.S. 122 (Tex.); *U. S. v. Malcolm*, 282 U.S. 792 (Calif.). See also *Warburton v. White*, 176 U.S. 484; *Arnett V. Reade*, 220 U.S. 311. In some States the income from the separate property of the spouses does not become community partnership property.

[3]The Treasury Departent Decision applying the Federal Estate Tax to Community Estates of spouses residing in Texas, on this basis, was the first ruling on the subject and was promulgated as early as August 24, 1920 as T.D. 3071. It clearly recognized the distinction between community estates and estates by the entirety.

The second Treasury Decision relative to the application of the Estate Tax to community estates generally, was promulgated March 3, 1921 as T.D. 3670, and was predicated upon the opinion of Attorney General Palmer dated February 26, 1921. It applied the same rule as previously applied in Texas to spouses residing in the states of Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada.

Treasury Decision 3670 was the result of a review of prior rulings regarding the application of the Federal Income Tax Act and the Fed-

RESPONSE TO THE OBSERVATIONS CONTAINED IN THE SOLICITOR GENERAL'S BRIEF UNDER THE HEADING "THE WIFE'S INTEREST UNDER LOUISIANA COMMUNITY PROPERTY LAW"

The Solicitor General, in his brief (pp. 13, 14, and 19) explains that he recognizes and does not attack the authority of the *Pfaff, Seaborn, Hopkins* and other community property cases, or the decisions of the Supreme Court of Louisiana holding that the wife is an equal owner of an undivided one-half of the community partnership property. After making this admission, however, the Solicitor General proceeds to make the same arguments with reference to the Louisiana Community Partnership Law which were contained in the Solicitor General's brief in the *Pfaff* and *Seaborn* cases and which were unanimously rejected by this court at that time.

For example, the Solicitor General again argues as he did in the *Pfaff* and *Seaborn* cases, i. e., that in applying the Revenue Act and imposing Federal taxes uni-

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[3]—(Continued.)
eral Estate Tax Act to community partnership property of spouses residing in the State of California. The Treasury Department decision recited that it was confined to the application of the estate tax and that the impact of income taxes was left open for review by the courts. The decision was accompanied by an opinion of Hon. Harlan Stone, Attorney General, dated October 9, 1924, which precluded any further court tests of the application of the Federal Estate Tax to community estates of citizens residing in California, particularly in view of the opinion of the Ninth Circuit Court of Appeals in the case of *Wardell vs. Blum*, 276 Fed. 226, in which *certiorari* had been denied by the Supreme Court of the United States. In this opinion the Attorney General recognized that there was doubt under the California decision as to whether the wife had a vested interest in community property that would authorize her to return one-half of the commmunity income as her own while the spouses were alive. He held that there was no doubt as to the proper application of the Federal Estate tax law and the non-taxibility in the husband's estate of the wife's half interest in community property, saying:

> "If the widow takes by virtue of her ownership in community property which is held by the community subject only to the power of disposition of the husband, obviously the estate tax has no application. * * * a study of the true character of that interest as it existed in the Spanish Law and as it has been developed in the jurisprudence of the community property states, including California, affords no substantial basis

formly this Court is interested only in real and practical ownership and not in definitions of ownership announced by state courts in interpreting the local laws, and that this Court will look at realities and not technicalities. In the *Pfaff*, *Seaborn* and other community property test cases, the Court carefully considered the local law in the light of the Solicitor General's arguments in this connection and unanimously held that the wife's ownership in the community partnership property, as defined by the local law, was not a theoretical but a real ownership because of the practical attributes of ownership enjoyed by the wife and the substantial restrictions and limita-

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[3]—(Continued.)

> for the hope that a renewal of the litigation on this subject in the Federal Courts would change the result."

The Attorney General in rendering his opinion promulgated Feb. 26, 1921, as Treasury Decision 3138, which dealt primarily with income taxes, discussed the Louisiana Statutes and decisions at some length and emphasized the fact that under the decisions the wife was not required to pay an inheritance tax on her one-half of the community estate, upon the death of her husband. The Attorney General also cited the decision by the Supreme Court of Idaho in the case of *Kohny vs. Dunbar*, (121 Pac., 544), and quoted therefrom as follows:

> "Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the property upon the death of her husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate."

Similar expressions are contained in decisions by the courts of other community property states wherein it is universally held that only one-half of the community estate is subject to the State Inheritance Tax upon the death of one of the spouses. For instance, in *Jones vs. State*, 5 S.W. (2d) 973, the Texas Commission of Appeals in a decision approved by the Supreme Court of that state implied that a construction of the State Inheritance Tax which would subject the whole community estate to such a tax upon the death of one of the spouses would render the statute unconstitutional; and said:

> "To impose the tax under such circumstances would be to visit the tax upon the real owner whose real right to the property has not been affected one way or the other by the death of a co-owner."

See also *Hansen vs. Blackmon, Collector*, 169 S.W. (2d) 955 (Texas Court of Civil Appeals; 169 S.W. (2d) 962 (Supreme Court of Texas.)

tions placed on the husband's power and authority as a fiduciary and manager of the community partnership.

The Solicitor General in the *Pfaff, Seaborn* and other community property test cases, also argued, as he does here, that the husband's authority and powers as manager and agent for the community partnership were so great that as a practical matter this court should treat him as if he were the real owner. This Court again, after analyzing the local law and the rights of the wife and the limitations and restrictions on the husband's authoity, held unanimously that although there were some powers the husband had which managers of an ordinary limited partnership or trustees of a spendthrift trust did not have, the community partnership was so closely and substantially analogous to those common law legal relationships that the husband was both in theory and practical legal effect merely an **agent.**

Ignoring all of the practical attributes of the ownership of the wife and the substantial limitations on the husband's authority as manager or agent of the community partnership, the Solicitor General in the *Pfaff, Seaborn* and other cases, sought just as he seeks in his brief in this case, to emphasize characteristics of the community partnership law which, he claims, seem to weaken the wife's ownership and to enlarge the husband's authority as compared with usual common law legal relationships.

An apparent peculiarity of the community partnership law emphasized again by the Solicitor General in his attempt to discredit the reality of the wife's interest in the community partnership is that the wife's separate creditors cannot seize assets of the community partnership for the payment of her debts. Her creditors can

reach the wife's undivided interest in the partnership but not the specific, tangible assets of the community partnership. The exemption of the assets of the community partnership from direct seizure for her separate debts (not for proper and necessary community debts incurred by her) was to prevent by indirection dual control in the management of the community partnership. If the wife could incur separate debts and thereby, indirectly, subject the community partnership property to seizure, she could indirectly participate in the management of the community partnership and thus bring about all the evils and friction of dual management. It is clear, therefore, that the discretion vested in the husband by the Louisiana marital partnership law to manage and administer the community as agent would be a vain and useless thing if his control in management could be harassed and defeated by the exercise of similar powers by the wife. Moreover, under Louisiana law, every partnership is a separate entity and partnership property can never be seized by a partner's individual creditors; such creditors can seize only the partner's interest in the partnership. See *Toelke vs. Toelke*, 153 La. 697, 96 So. 536. The rule governing the rights of the wife's creditors in this regard is similar to that applied in Louisiana in all partnership cases. The application of this rule does not detract from, but on the contrary directly supports, the reality of the wife's present ownership in community partnership property.

A strong parallel to the wife's position in Louisiana is to be found in the common law decisions and statutory provisions of many states in connection with the regulation of "spendthrift trusts." Most of the states recognize "spendthrift trusts," and many of them have special statutes providing for the creation of "spend-

thrift trusts." See Ruling Case Law, "Trusts," Paragraphs 116 to 118. It is possible for property to be put in the hands of a trustee for the benefit of the *cestui que trust* or beneficial owner of the property, subject to the stipulated conditions that the beneficial owner cannot alienate or dispose of his beneficial interest, that the trust property shall not be subjected to attachments for the debts of the beneficial owner, and that the investment, administration and control of the property shall be entirely vested in the trustee. In such a trust the beneficial owner cannot control the management of the property, cannot decide how the property shall be spent, and cannot sell the property, nor can the property be subjected directly to his debts. A beneficial owner, under such circumstances, cannot interfere in any way with the control and administration of the trust so long as the trustee properly manages the property and is not guilty of fraud or a breach of trust.

No one would seriously contend that the **trustee** of a "spendthrift trust" is the **owner of the property** and that the property should be considered as belonging to him for tax purposes merely because of restrictions with reference to the beneficiary's control and administration of the property or its exemption from seizure for the beneficiary's debts; nor has it ever been suggested that the trustee under such circumstances, for tax purposes, should be considered in reality the owner because of his practical control. There is no more basis for the suggestion that, in Louisiana, the husband, as managing partner of the community partnership, is the owner because of his power of administration and that the wife has no property rights because of the exemption of the community property assets from direct seizure for her separate debts.

The Solicitor General in his brief in this case (p. 41) relies again, as he did in his brief in the *Pfaff* case and in the other community property test cases, on the analogy of the common law rights of **dower** and **courtesy.** This analogy was rejected by this Court in the *Pfaff*, *Seaborn* and other community property test cases. Indeed it had been presented to and rejected by this Court many years previously. See *Arnett vs. Reade*, *supra*, decided in 1911 where the Court after referring to this contention, speaking through the late Mr. Justice Holmes, said:

> "However, this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. * * * We should require more than a reference to *Randall vs. Krieger*, 23 Wall, 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

Again the discussion by the Solicitor General of the principle of "forced heirship" shows how wide of the mark he is forced to go for an analogy. In no system of jurisprudence has an heir an interest in the property of another before the latter's death. A forced heir is still only an heir, who possess no right not held by any other heir, except that the policy of the State forbids his disinheritance without cause in order to assure that the whim of the decedent may not reduce his inheritance below the fraction (legitime) fixed by law.

But never has a son been deemed to have even the shadow of right in the property of his living father. Not only does his right as heir originate at the time of, and because of, his father's death, but, even then, his legitime

cannot possibly be estimated until a liquidation of the estate determines whether donations *inter vivos* and *mortis causa* have infringed thereon. In brief, he is but an heir, acquires only by death and inheritance; but with the sanction of a law which entitles him, upon the happening only of the event of death, then to reduce such donations as would otherwise cause his whole or partial disinherision of that proportion of the estate which the state law of descent and distribution declares he should inherit.

The Solicitor General (Page 27-28 of his brief) suggests that prior to *Succession of Wiener*, the community partnership property was subject to the husband's separate debts. With due deference, this unqualified statement is misleading and not an accurate statement of the prior law of Louisiana. In fact, the Solicitor General, in another part of his brief, qualifies this statement. The Louisiana law makes clear that it is the duty of the husband, as manager of the community partnership, not to use any part of the community partnership property to pay his separate debts or to permit a seizure of any of the assets of the community partnership for his separate debts. Article 2403 of the Louisiana Civil Code provides that "debts contracted during the marriage enter into the partnership of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects". See also *Childers vs. Johnson*, 6 La. Ann. 634 at page 641, decided in 1851. The Solicitor General does not point out until later in his brief, and then not clearly or emphatically, that under the Louisiana law the husband is required to pay his separate debts out of his separate estate, and if he does use com-

munity partnership property in violation of his duty and the law to pay separate debts, or permits community partnership assets to be seized for his separate debts, he does so wrongfully and he must account for it and reimburse the wife, either out of his separate property or his one-half of the community partnership assets, for her half of the community partnership assets which have been improperly used. See *Glenn vs. Elam*, 3 La. Ann. 611 (1848); *Dillon vs. Freville*, 129 La. 1005 (1912), *Succession of Casey*, 130 La. 743 (1912), Louisiana Civil Code, Article 2403, *Childers vs. Johnson*, 6 La. Ann. 634, (1851).[3a]

The Solicitor General, in his brief, evidently for the purpose of attempting to discredit the extent of the various rights of the wife to a separation of property and a dissolution of the community partnership in Louisiana, criticizes the decisions of the Louisiana Supreme Court in the case of *Davock vs. Darcy*, 6 Robinson 342, decided in 1844, over one hundred years ago. In this case the Court construed Article 2425 of the Civil Code as not restricting the wife's right to a separation of property to cases where her dowry was involved or she had separate claims. Whether this decision in 1844 was a proper, socially

[3a]In *Glenn vs. Elam*, 3 La. Ann. 611 (1848), it was held that even if the monies used by the husband to pay his separate debts are revenues from his separate estate (which under the law of Louisiana fall into the community), he becomes indebted to the community for the amount of such revenue so used and must reimburse the community therefor, the Court saying at page 615:

> "It has been contended that the Gillespie community is not entitled to recompense for the debts of the husband, paid by him during the community, out of revenues arising from his separate estate. If the revenues of the estate of the husband formed a part of the community, and we do not understand this to be questioned, their origin does not affect the right of the community to exact remuneration for the payment of debts to which they have been applied."

In *Dillon vs. Freville*, 129 La. 1005 (1912), it was held that if the husband exchanges separately owned immovable property for other like property with money "to boot", he and his estate become indebted to the community for the amount of the money in the absence of proof that the money was his separate property.

justifiable and forward-looking interpretation of the article of the Code in the practical evolution of the Louisiana community partnership law for the protection of the wife's interest and ownership in one-half of the community partnership property, which we think it was, or amounted to judicial legislation, as the Solicitor General, evidently relying on Professor Daggett's writings, seems to suggest, is immaterial for the purposes of this case. The decision in *Davock vs. Darcy*, broadening the interpretation and application of Article 2425 of the Civil Code, has been consistently followed and applied in numerous decisions and is now the settled law of the state.[3b] Again evidently relying on Mrs. Daggett's writings in 1931 and prior years, the Solicitor General attempts to restrict rigidly the interpretation of Article 2425 and the earlier Louisiana decisions on separation of property, interpreting and applying Article 2425 to the actual facts involved in each case and to a strict and literal interpretation of his idea of the meaning of the earlier decisions, and he complains that the Supreme Court of Louisiana has recently given a much broader interpretation of and meaning to Article 2425 of the Code and to the earlier cases than their facts and language justify. The strict and limited interpretation of the earlier cases suggested by the Solicitor General completely ignores the reasoning and theory of the cases and the underlying philosophy and development of the Louisiana jurisprudence. It also ignores the reasoning and underlying philosophy of the Supreme Court of Louisiana in constantly enlarging and giving a more liberal inter-

[3b] *Jones v. Morgan*, 6 La. Ann. 630; *Wolfe & Clark v. Lowry*, 10 La. Ann. 272; *Mock v. Kennedy*, 11 La. Ann. 525; *Webb v. Bell*, 24 La. Ann. 75; *Vickers v. Block*, 31 La. Ann. 672; *Chaffe v. Watts*, 37 La. Ann. 324; *Brown v Smyth*, 40 La. Ann. 325; *Walmsley v. Theus*, 170 La. 417; *Gastauer v. Gastauer*, 131 La. 1; *Carite v. Trotot*, 105 U.S. 751; *Jones v. Jones*, 119 La. 677; *Hill v. Hill*, 115 La. 489; *White v. White*, 159 La. 1065.

pretation and application to Article 2425 and to the earlier Louisiana cases.[3c]

In defining and appraising the meaning of both negligent and fraudulent mismanagement, the Louisiana Supreme Court necessarily and properly interpreted the words "mismanagement" and "fraud," as used in our codal articles, as they are ordinarily interpreted in application to the obligations and duties of agents, managing partners and other fiduciaries in common law states. The Louisiana Supreme Court in *Succession of Wiener, supra*, did not enlarge, but merely summarized and restated the principles and philosophy of the Louisiana codal articles and the rules established by the jurisprudence of the state when it said:

> "It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. * * * The community partnership had to be placed in charge of a managing partner for very expeditious and necessary reasons — dealings with third parties with respect to the community property had to be protected from the nullifying

[3c]The language of Article 2425 of the Civil Code would seem plainly to give the wife the right to the separation whenever the mismanagement of the husband, or the disorder of his affairs, justifies the belief that "her rights" may be endangered. Those rights manifestly include her interest in the community. It is of interest to note that the Louisiana jurisprudence, which the Solicitor General says broadens the language of the Code, is no different from the doctrine in France under a codal article identical in terms. See authorities cited in *Davock v. Darcy*, 6 Rob. (La.) at page 345. *Marcade*, one of the most highly respected of the French Commentators on the Code Napoleon, says, in his comment on Article 1443 of that Code, which corresponds to Article 2425 of the Louisiana Code, that the wife has the right to separation even if she has brought nothing into the marriage, or even where she is not capable of earnings, because she always has an interest in the conservation of her half of whatever community is left after her husband's dissipation. Other commentators are to the same effect.

actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its effects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

"But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife's right to assert such limitations. * * * The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive managment and control of her half of the community partnership whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized."

But in any event this Court is bound by the later repeated decisions of the Supreme Court of Louisiana on this point of Louisiana law.

In order not to lengthen unduly our main brief and in order to prevent any confusion with regard to the present status of the extent of the wife's rights in connection with a separation of property and a dissolution of the community partnership, we have prepared as Appendix B (pp. 16-23), an exhaustive discussion of the Louisiana cases interpreting Article 2425 and the history of the development of the Louisiana jurisprudence with regard to the wife's rights in this connection.

We agree entirely with the logic and soundness of the interpretation of the Supreme Court of Louisiana as to the meaning of its previous decisions. However, regardless of our views or those of the Solicitor General, it is certainly immaterial and irrevelant in this case to debate whether the Solicitor General or law writers have correctly interpreted certain former decisions of the Supreme Court of Louisiana when, subsequent to the expression of this opinion by the law writers, decisions of the Louisiana Supreme Court have interpreted in a different way the meaning and application of the articles of the Louisiana Code and of the Court's previous decisions. That the husband is an agent and managing partner with substantially the same authority, obligations and duties of an agent or managing partner in common law states is now settled in Louisiana by the Supreme Court of the state. We understand that the Solicitor General admits this to be settled law and policy under our dual form of government. We would not have felt it necessary to make this explanation but for the fact that the Solicitor General in his brief quotes from Professor Daggett's articles and analyzes some of the earlier Louisiana decisions along the same lines discussed by Mrs. Daggett in articles which were written before the Louisiana Supreme Court effectively and, as we thought, finally settled the issue.

The Solicitor General states (his brief page 23) that the husband "administers it (community partnership) as he pleases and may expend the funds to gratify any personal desire without liability to account to the wife for his administration." He cites *McCaffery vs. Benson*, 40 La. Ann. 10, and *Frierson vs. Frierson*, 164 La. 687, in support of this statement. This unqualified statement is certainly not the law of Louisiana. The two

cases cited must be read in the light of other Louisiana cases and the articles of the Louisiana Civil Code to which we have referred in our brief. (See pages 12 to 20). The limitations and restrictions of the husband as managing partner, contained in our summary, demonstrate that it is not true that the husband may "gratify any personal desire without liability" to his wife. It is true that because of the intimate relationship between husband and wife, the husband, as manager of the community partnership, is presumed to act in good faith and to administer the assets and revenues of the community partnership as a good agent and for the benefit of the community partnership and in the interest of his wife and of the family. **It is not expected that a set of books be kept by the husband itemizing the income and expenditures during a long married life** or that the husband must be prepared, when the partnership is dissolved, to show affirmatively all of the details of the acquisition and management of the assets and revenues of the partnership. In this sense the husband is not required to make a detailed accounting as an ordinary managing partner of a commercial partnership. On the other hand, the husband is accountable and must reimburse the wife, if it is shown that he has given away community partnership property, grossly mismanaged the community partnership with resulting unjustifiable losses, used community partnership assets to pay his separate debts or to improve his separate property, or disposed of such property in dissipation and in fraud of his wife's rights as a partner. (See La. Civil Code, Art. 2404 and authorities cited, pages 12 to 20, *supra.*)

In the *Benson* and *Frierson* cases, it will be noted that there was no allegation or claim by the wife that the husband had concealed community partnership prop-

erty or had mismanaged the community partnership property or had disposed of any of this property in violation of his duty as managing partner. He was not compelled to submit a detailed accounting in the sense of showing affirmatively by the records and books, particulars of the history of his handling of the community partnership assets and revenues. But he was and would have been held accountable in the cited cases upon allegation and proof that he had violated his duties as agent and managing partner of the community partnership, and the Louisiana Supreme Court plainly indicated this by stating that no such allegations were made or suggested.

We do not understand the significance or relevance of the statement in the Solicitors General's brief that the husband in Louisiana is personally liable for community partnership debts. It is settled law in Louisiana and most of the common law states that a managing partner of a limited partnership or a commercial partnership is personally liable for partnership debts. Moreover, his interest in the partnership can be subjected to the payment of his separate debts.

When one stops to consider the intimate, delicate and sacred relationship of husband and wife and the psychological necessities for the peaceful and happy realization of the relationship, and at the same time recognizes that the framers of the historic Civil Law codes have woven into the marital status a practical commercial partnership, it is astonishing that the dictates of public policy and adaptive legal philosophy, in reconciling and harmonizing the two legal relationships, have resulted in modifying and restricting ordinary commercial partnership principles so very little.

It is always confusing to attempt to isolate and mathematically measure attributes of ownership. The Solicitor General admits that the legal and practical attributes and characterictics of ownership under local law vary in the different states, and vary with regard to the same type of legal relationships in different states.

Stripped of all subtleties of reasoning, critical observations and isolated and remote arguments by analogy, the Solicitor General's position, in substance, is that since the husband is managing partner or agent of the community partnership, and the management and business control is thus taken away from the wife with reregard to her undivided half ownership of the community partnership property, the husband should be treated for tax purposes as the real, complete and beneficial owner of all of the community partnership property, including the wife's half, and the wife's half should be completely ignored, and from the standpoint of ownership is not entitled to protection under the Constitution.

The simple answer to this contention is that during the long history of the development of the English and American common law systems, our courts have always consistently and universally recognized ownership of property as being substantial and real and as being entitled to protection under the constitution, even though the management and control of the property has been separated and vested in other individuals or corporations. We need only refer again to a few elementary and familiar examples, such as spendthrift trustees and their beneficiaries, managing partners and limited, special or silent partners,[34] guardian and ward, and curator and interdict.

[34]A limited or silent partner is called a "partner in commendam" in Louisiana. See Articles 2839, 2844, 2849 of the Louisiana Revised Civil Code.

In the light of the practical and substantial nature of the wife's ownership and restrictions on the husband as agent and managing partner of the community partnership which we have previously outlined (*supra* pp. 12 to 20), we submit that the Solicitor General is asking, in effect, that the wife's undivided half ownership in the community partnership be treated as belonging to the husband and as taxable to him when, as a matter of fact, he cannot give it away if he chooses;—when he cannot dispose of it in fraud of his wife's property rights, if he pleases;—when, if he is reckless, careless, or a bad manager, he loses its administration; when, if he is of a speculative disposition, or the disorder of his affairs is such as to jeopardize his wife's property rights, he loses its administration;—when he is accountable for and must reimburse the wife for any losses she sustains because of his mismanagement or fraud;—when he loses its administration in case of a divorce even if without any fault on his part, his wife is unfaithful to her marital obiigation;—when he cannot spend it to improve his separate property, if he wants to;— when he cannot use it to pay his separate debts, if he pleases;—when he cannot dispose of it by will, if he chooses;—when he has no right or power to have it descend to his heirs;—when, if his wife dies, he loses its administration and must deliver it to his wife's legatees or heirs even though these heirs may be illegitimate children of another man;—and when if it is willed to him by his wife, he takes it not as owner, but only by inheritance, and is compelled to pay both a state inheritance tax and a federal estate tax for the privilege of receiving it.

None of these restrictions and limitations on the power of the husband with regard to property and income acquired by his efforts during marriage exists in

common law states, where the husband is the owner of all of such property and income, and, conversely, the restrictions and limitations we have outlined exist in Louisiana, because the wife is the owner of one-half of the property and income acquired during marriage by the marital partnership composed of both husband and wife.

We have emphasized the fundamental and practical features of the Louisiana community partnership law, in order to show clearly that the community partnership between husband and wife in Louisiana and other community property states is not a theory, but is, in substance, a partnership imposed by law, which creates burdens and limitations as well as privileges in relation to the property rights of husbands and wives. These burdens and limitations on property rights are unknown in the common law states. If it were true that any so-called tax benefits flowed from the community partnership law, the circumstances would be logically immaterial, but as a matter of fact they are more than counterbalanced by the multitude of burdens and restrictions placed upon the property rights of husbands and wives in Louisiana, which do not exist in any common law state.

SOURCES OF COMMUNITY PARTNERSHIP PROPERTY

Mr. Wiener died testate, leaving his entire estate to his three children, who are the appellees here. Such "entire estate," under the local law, consisted of his undivided one-half interest in the community partnership property. That was all that he could dispose of, or that his legatees could receive; this because all that Mr. Wiener owned under the local law — and hence all that he could dispose of — was his interest in the community

partnership, namely, an undivided one-half interest in the partnership estate. The record reveals only that Mr. Weiner was married in 1907, and, that the property used to measure the tax here involved consisted of all of the community partnership property (except a small amount of real estate in Mississippi) acquired during the existence of the marriage which his death terminated, all of which at the time of his death was owned by him and his wife as partners in the community partnership. It is necessary, therefore, to resort to the local Louisiana statutory definition of "community partnership property" to determine from what sources this property could have been acquired.

In Louisiana, all property found in the possession of either spouse, upon dissolution of the marriage, is presumed to be community partnership property and acquired during the existence of the marriage, unless it can be clearly identified as belonging to the separate estate of one or the other. (Louisiana Civil Code, Art. 2405, Ap. 11 *infra.*) The separate estate of either spouse is (in addition to some unimportant items) that property which that spouse owned at the time of the marriage or thereafter acquired by gift, devise, or inheritance. Revenues from separate property, as a general rule, fall into the community partnership (La. Civil Code, Arts. 2402, 2399, 2406, 2404, 2385, 2386, Appendix pp. 11, 12 and 13, *infra.*) Property once separate can lose that separate character and become community property through commingling and a failure of positive proof identifying it as separate property; the community partnership is the favored estate and everything not identifiable and clearly traceable as separate property falls therein, regardless of its method of acquisition.

Therefore the community partnership property used

to measure the tax can in any case come from no other than one, or more, or all, of the following sources:

(a) Savings from compensation received for the husband's personal services;

(b) Savings from compensation received for the wife's personal services;

(c) Savings from revenues of the wife's separate estate;

(d) Savings from revenues of the husband's separate estate;

(e) Profits from gainful occupation where neither spouse nor minor children received compensation for services actually rendered, such as farming, ranching, merchandising, joint enterprises, manufacturing, etc.;

(f) Property purchased during marriage on credit or with borrowed funds;

(g) Property acquired with commingled or unidentified property or with joint funds;

(h) Miscellaneous sources, as, for example, property acquired with savings from compensation received for the personal services of minor children, or property acquired by adverse possession, and similar acquisitions;

(i) Profits and savings from reinvestment of property or funds received from sources (a) to (h) inclusive.

The parties here were married for some thirty-four years (R. 7, 8). Never, before the amendment of 1942 now in question, had there been any necessity or requirement that the husband and wife keep books or records

showing the source of funds used to acquire community property and the investment, from time to time, of the revenues of community partnership property. Therefore, in the generality of cases, and undoubtedly, in this case, it is impossible, upon the death of the spouse most familiar with the business transactions, for his executor or legatee to trace the transactions of a long married life and determine through many mutations and changes the origin of each particular community asset on hand at death or whether any particular community partnership property or asset was acquired through reinvestment of moneys or property obtained from separate property or from the earnings of either spouse or from community partnership property not so traceable. Yet this is a burden which the 1942 amendments undertake to impose.

THE 1942 AMENDMENTS

The Revenue Act of 1942 attempts to establish a new and revolutionary method of taxing community partnership property at death. That Act abandons, as to community partnership property, and as to community partnership property alone, the test of ownership at death, as the controlling factor in measuring the tax. It purports to substitute therefor, as to community partnership property, and as to community partnership property alone, varying uncertain capricious, arbitrary and confiscatory tests, some applicable in one case, some in another.

Section 402 (b) (2)[4] requires that the entire interest of both spouses in all community partnership property be included in the gross estate of the first spouse to die, with two exceptions only: (1), property received as or derived from compensation for personal services actually

[4]See page 2, *supra*.

rendered by the surviving spouse; and (2), property derived originally from the separate property of the surviving spouse.[5] Even as to these items of community partnership property, a minimum of one-half must be included in the decedent's estate, because of his or her power of testamentary disposition over one-half of all community partnership property.

In the teeth of the state law providing for the equality of ownership of the spouses in community partnership earnings and acquisitions, the statute by pure legislative fiat arbitrarily creates three categories of community partnership property for federal estate tax purposes.

(1) The first category includes community partnership properties traceable to the husband's earnings or to income from his separate property. If the husband dies first, all of such community partnership properties must be included in his estate, but if the wife should die first, one-half of these properties is includible in her estate;

(2) The second category includes community properties directly traceable to the wife's separate earnings or to income from separate property. If she dies first, all of such community partnership properties fall into her taxable estate; but if her husband predeceases her, one-half of such properties is included in and taxed to his estate.

(3) The third and most important category, since it usually comprehends the bulk of community partnership property, consists of all properties not directly

[5]As the Committee Report on the Bill shows, the excepted items include "(1) property acquired in exchange for separate property, (2) community income yielded by such property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property." S. Rep. No. 1631, p. 231.

traceable to the earnings or income from the separate property of either spouse.[6] As to the community property falling into this category, the full value is included in the estate of the first spouse to die. If the husband dies first, both halves are included in his "gross estate"; if the wife dies first, both halves are included in her "gross estate".

It is to be noted in the first place that in the creation of the three categories of community partnership property we have described, the amendment abandons and disregards the established constitutional rules of estate taxation, and arbitrarily disregards the constitutional right of each state under the Tenth Amendment to determine the ownership of property. It abrogates the local law and by legislative fiat sets up at least **three,** and according to the Government's contention, **four,** different rules of taxation to be applied, depending upon the circumstances of the particular case.

1. The statute selects ownership or the power of testamentary disposition as the taxable event in certain cases. We may term this the "minimum rule" of taxation under the statute. A decedent, husband or wife, is always taxed under the statute on all property which he or she owned, that is to say, over which he or she had a testamentary power of disposition. But ownership is not made the sole criterion or test of taxation, except when it is profitable to the government to apply it. A decedent in Louisiana, more often than not, under this statute will be taxed on property which he or she did not own and over which he or she had no power of testamentary disposition. For example, the surviving husband or wife does not own, and has no power of testamentary disposition over, the share of the community property traceable

[6]See pp. 37 to 39, *supra*.

to the decedent's separate earnings or separate property, and yet the decedent's estate is taxable on this property although he or she did not own half of it and did not have the testamentary disposition of half of it. This is so because both earnings of each spouse and income from separate property are—except in rare and special instances—community partnership property. As such, the power of testamentary disposition is, of course, limited as to each spouse to an undivided one-half. And, yet, the decedent's estate is taxable, not for the part owned nor yet for that part testamentarily disposable, but for the whole. Moreover, in the third category of community property which we have already referred to, where the community property was accumulated by husband and wife in a joint enterprise operating a farm or a husband and wife operating a store or other business, or where the community property was accumulated as a result of borrowing money, that is, incurring a community debt, the community partnership property is not traceable to or derived from the "personal services" or the separate property of either spouse, and yet all of this property is taxed in the estate of the decedent, husband or wife, depending upon the accident of whichever one dies first.

2. The Committee's report indicates that the theory of the statute is to tax the spouse who created the estate, or, as it states, to tax the spouse to whom the property is "economically attributable". This second test or basis for the tax—to tax the person to whom the property is "economically attributable"—is not, however, the sole criterion. It is only applicable under the statute when it result in **increasing** the amount of the tax. For example, when the community partnership property is directly traceable to the decedent's separate earnings or to his or her separate property, and he or she dies first, the whole

of the community partnership property is taxed to him or her. However, if the non-producing spouse dies first, the test as to who created the estate or as to whom it is "economically attributable" is abandoned, because if this test and rule is consistently applied there would be no tax in the event of the prior death of the non-producing spouse. The statute undertakes to avoid this result by providing that in such a situation, when the so called non-producing spouse is the decedent, the test of ownership or power of testamentary disposition shall apply, and the decedent's estate shall be taxed on at least one-half of the community partnership property. Moreover, we should point out again that if the community partnership property is not traceable to the compensation for personal services or separate property of either spouse and consists of property derived from their joint efforts in a farming or merchandising business or from community loans, the test of taxing the decedent who created the estate is again abandoned and the tax is laid on the whole estate without regard to who produced it, who owned it, or who had the testamentary power of disposition over it.

3. The third situation in which taxes are imposed by the statute cannot be explained on either of the two theories we have just discussed, namely either the theory of ownership or the theory of taxing the spouse who created the estate or to whom it was "economically attributable". The third situation involves community partnership property of the category we have already described when the husband and wife, as partners, accumulate community partnership property not for "personal services" but as a result of farming, merchandising or any other business in which they both participate, or accumulate such property as a result of the successful investment of the borrowed money, i. e., community partnership debts. In

this situation, the first spouse to die is taxed on the whole, including the survivor's one half share, even though the decedent had no ownership over the other half or testamentary disposition over it, and even though the decedent was not the creator of the estate. We are left to conjecture as to the reason or excuse for the tax in such a case. Apparently, under such circumstances each spouse is presumed, in the teeth of both the law and the facts, to own outright the entire property and whoever dies first is taxed on all of it.

4. Although the Government contends that cessation of management is the test of taxability under the 1942 Statute, the statute, neither in its terms nor its operative effect, is directed at cessation of management. As a matter of fact, as it will hereafter be shown (pp. 65 *et seq.*) in about half the cases where the wife dies first there is no cessation of management and this test is not applicable to support the statute. When the wife dies first the husband continues to manage his half of the community partnership property and actually loses his management of his wife's half of the community partnership property. It will also hereafter be shown (pp. 57 *et seq.*) that where the husband dies first the termination of his agency or management is not a property right and does not involve a shifting of economic benefits or valuable rights which can be considered property rights in the sense that the cessation of such an agency can, consistently with the Constitution, serve as the basis or excuse for an estate tax. Even if it is assumed, however, for the purpose of argument that the cessation of management could possibly justify the tax under the Constitution when the husband dies first, this theory completely fails to explain or justify the tax in the other half of the cases where the wife dies first. The statute is not severable. Under such circumstances there is no

theory or constitutional justification whatever supporting the validity of the statute which requires the husband's half of the community partnership property always to be added to the wife's half of the community partnership property for the purpose of calculating and imposing the graduated federal estate tax on her estate.[7]

In the light of the foregoing summary, it is apparent that the statute represents a curious, inconsistent and arbitrary intermixture of tests involving recognition of State law at times and complete disregard for State law at other times. It adopts one test for tax purposes under one set of circumstances and another test under a different set of circumstances, none of which have any rational or logical relationship or basis as an excuse for estate taxation. The law of the state is recognized in determining the minimum taxable estate by the provision requiring inclusion of all property over which decedent possessed the power of testamentary disposition. The law of the state is entirely disregarded in determining the maximum taxable estate by the provision requiring inclusion of the portion of the community partnership property always belonging to the surviving spouse.

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[7]The statute does not expressly make the cessation of management the excuse for the tax, and, in its operative effect, the statute does not lay the tax on the termination of management. In the case of the wife's prior death, the testamentary power of disposition is selected as the subject for the tax, even though the husband is the manager of her interest in the property. Should she die first, the fact that she or her property originated his wealth and not the fact that her husband at that time was manager, is made the occasion for the tax. But were the husband to die first, even though death terminate his management over all community partnership property, including such portion thereof as might be property traceable to his wife's separate earnings or separate property, the statute would tax the husband's estate only on one-half of the property so traceable. Thus, the source of the property in such an instance becomes more important for estate tax purposes than cessation of management. Moreover, cessation of management is utterly disregarded in cases where the wife dies first and her estate is taxed on the whole property as in category 3 above. Cessation of management is not considered where the management of the property is in the wife; as, for example, where, on a showing of lunacy or abandonment by the husband, the wife takes over administration of the entire estate.

The effect of this statute, then, is: to disregard property rights; to tax one taxpayer with respect to the property of another; to tax him on property which he never owned, which he could not give away, could not and did not transfer at death and which he could never convert into his own separate property. It treats (that is, conclusively presumes) two separate persons as owning the same property at the same time. It makes the tax depend on the sheer accident of which of the two spouses may happen to die first.

For example, the storekeeper and his wife are both regarded as owning at the same time the entire business, including the interest of the other, and the first to die is taxed on the whole. A farmer and his wife are each considered as owning the whole of their lifetime savings and the first to die is taxed on the whole. A man or his wife may purchase securities on credit for their common benefit and pay off the debt with the income therefrom; yet each is considered as owning the whole and the first to die is taxed on the whole. In fact the bulk of all property in the community property states will be taxed to the first spouse to die, because most community partnership property is not derived from compensation for "personal services" or separate property of either spouse (see pp. 37-38, *supra.*) and that which is so derived usually cannot be traced to such source.

This resume sustains the charge that the amended law applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates—and upon such estates alone. Other considerations reinforce this conclusion.

The Community Property Amendment, if upheld, will completely confiscate many estates and frequently will

deprive a man, after a lifetime of labor, of the right or opportunity to leave anything whatsoever to his children or legatees. This can result because there is no statutory provision authorizing the decedent's executors to surcharge the surviving spouse's share of the property with any portion of the decedent's tax, comparable to the specific provision (Section 826 (c)), Internal Revenue Code, App. page 10, authorizing the executors to collect from insurance beneficiaries.[8]

The arbitrary and confiscatory character of the 1942 Community Property Amendment is further illustrated and emphasized by the fact that only one-half of community partnership debts can be deducted in calculating the decedent's tax. This is so because no change was made in the provision allowing deductions of claims against the estate, in determining the taxable estate. Only

[8]For example, if a spouse dies possessed of a one-half interest in a net community estate of $6,000,000.00 in value, and there are no deductions which can be proved as traceable to separate services or property, the estate tax deductible for his one-half interest, but measured by the whole, would be $3,138,200.00, or $138,200.00 more than his entire estate of $3,000,000.00. This would mean that the husband or wife, as the case may be, would have nothing whatever to leave to their children or legatees. This would result because the Revenue Act, although imposing a lien on the survivor's half of the community for the payment of the tax and making the survivor personally liable, (Section 411 (b) Internal Revenue Code, App. pg. 6) also gives the survivor a right of reimbursement for any taxes collected for the payment of the decedent's tax. (Section 826 (b) Internal Revenue Code App. pg. 10.) Even if the provisions of the Revenue Act could be construed as requiring a proportionate contribution between the decedent's estate and the survivor's estate for the payment of the tax, the effect of the Community Property Amendment would be to impose upon the decedent an unfair and much heavier tax and penalty because of the adding of the survivor's shade to the decedent's share of the community in calculating the tax, on account of the graduated estate tax rates. For example, even if the estate tax laws could be so construed as to make each spouse pay a proportionate share, in the example we have given of a $6,000,000.00 estate, the total tax of $3,138,200.00 would be divided between the decedent's estate and the survivor's estate, and each would pay $1,569,100.00. If only the $3,000,000.00 estate of the decedent were subject to the estate tax and the $3,000,000.00 belonging to the survivor was not added to measure the tax, the tax would be $1,263,200.00, or approximately $300,000.00 less. In other words, $300,000.00 would be an arbitrary penalty imposed on the decedent by reason of including property belonging to the survivor in calculating the decedent's tax.

the decedent's debts, that is, one-half of the community debts, are deductible. See Section 812 (b), (Internal Revenue Code, Appendix, pages 8-9). Not only is this grossly unjust, but its operation will materially increase the number of estates entirely confiscated by the tax.[9]

Another arbitrary, capricious and unfair result of the amendment of 1942, when applied to the Revenue Law, is that different rules of income taxation applicable to sales of community partnership property after death than are applicable to similar property in other states will result.[10]

If community property is given away, the husband may be treated as the owner of the property, and may

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[9]In fact, under some circumstances, the statute would require a tax to be paid by an estate which would owe no tax but for the situation presented by the statute. Given the normal Louisiana case, the only property belonging to a husband and wife is the respective half interest of each in the community partnership which exists between them. Suppose a community has assets worth $300,000.00 but owes debts amounting to $350,000.00. The community is, therefore, clearly insolvent yet, on the death of the spouse dying first the total community property, $300,000.00, would be considered as the base. From this would be deducted only one-half of the debts, to-wit $175,000.00, leaving $125,000.00. From this would be deducted the $60,000.00 statutory exemption. On the remainder, to-wit, $65,000.00, estate taxes would have to be paid. Thus, estate taxes would have to be paid though in law and in fact the entire estate belonging to the deceased was consumed by debts and the deceased left no net estate whatever.

[10]For example, if community partnership property is sold after the death of one of the spouses, the basis for determining the gain or loss is the value at the date of death of the decedent's one-half interest and the original cost of the survivor's one-half interest. (See Section 113 (a) (5), Internal Revenue Code, Appendix pages 10-11). The result, if the 1942 amendment is upheld, is that, if community partnership property which has enhanced in value after its acquisition is sold after the death of one of the spouses, the surviving spouse is liable for income taxes on the profit resulting from the disposition of the survivor's one-half interest, despite the fact that under the 1942 amendment the decedent's estate has been required to pay an estate tax on the entire property at the value at which it was sold, that being the value at the date of death of the spouse first dying. The rule in other states is that property sold after death carries, as its basis for gain or loss, the fair market value at the decedent's death. Only in community states is the basis for one-half of the property fixed by original cost. This difference in treatment is logical and correct when the survivor's property is not taxed in the estate of the dying spouse. But it becomes arbitrary and confiscatory under the operation of the estate tax provisions of the 1942 amendments.

be required to pay a gift tax on the whole community, even though the "gift" to the extent of one-half be to the wife of her own property, and even though, shortly before she may have paid income taxes on the same property.[11] Thus, the husband may be regarded as the owner, and required to pay a gift tax if a gift is made during his lifetime (Sec. 453); yet, if no gift is made and the wife dies, she is regarded as the owner, and her estate must pay estate taxes on the same property, always on one-half; and, more often than not, on the whole, (Sec. 402 (b) (2)). The arbitrary federal presumption created by this statute in contradiction of the state law determining ownership and, also the difficulty, and in most cases the impossibility, of doing the tracing which the act purports to permit will usually accomplish this unlawful and unjust result.[11a]

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[11] Under Section 453 of the Act of 1942, Appendix page 6, *infra*, all gifts of community property are charged to the husband, unless the poperty is directly traceable to the wife's compensation for "personal services" or separate property, an impossibility in most cases. If a gift is made of community partnership property in contemplation of death, the husband is regarded as the owner of all the property for gift tax puposes, and must pay the gift tax on all (Section 453). Yet if the wife dies, she is deemed to have made the gift and must pay the estate tax, not on half of the property, but on the whole, in most instances. (See Section 402, Revenue Act of 1942, page Ap. 1 *infra.*) Similarly, if community partnership property is given away, the husband retaining a life income, he is treated as owner of the whole, and pays the gift tax (Section 453). But at his wife's death, she is deemed to have made the gift and her estate bears the tax on the whole. In neither case is the gift tax paid by the husband available as a credit against the wife's later estate tax. (See Section 183 Internal Revenue Code.) It is only in the community partnership property states that this credit is denied.

[11a] In line with the policy of the Treasury Department ignoring the local community partnership law, the regulations interpreting the 1942 Community Property Estate and Gift Tax Amendments provide that in the event of a dissolution of the community partnership by the husband and wife a gift tax must be paid by the husband on the one-half of the property delivered to the wife in connection with the liquidation of the community partnership although it is her property under the local law, because the statute conclusively presumes that the property received by the wife is the property of the husband unless shown to have been received as compensation for personal services by the wife or derived from her separate property. The interpretation of the 1942 community property gift tax amendment is announced in *Regulation* 108, *Section* 86.2 of the *Federal Gift Tax Act* which provides: "the rule . . . applies

When life insurance forms all or part of the taxable estate, there is a veritable maze of confiscatory and capricious treatment under both the gift and estate tax laws. Laws of property and laws of insurance are utterly disregarded, and the self-contradictory theory of dual ownership is applied.[12]

Where the community partnership is dissolved by a separation of property under the Louisiana law, with-

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[11a]—(Continued)
alike to a transfer by way of gift of community property to a third party, or third parties, to a division of such community property between husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property of either of the husband or of the wife. . . ."

It follows from the above ruling that a gift tax will be imposed if the community partnership is dissolved by voluntary agreement as is permitted in the State of Washington. A voluntary dissolution is not permitted by the law of Louisiana. In Louisiana, however, where the dissolution can only be brought about as a result of a Court decree in the case of (1) separation of property from mismanagement, fraud or some other cause, (2) a separation from bed and board, and (3) a divorce, apparently a gift tax would be nevertheless imposed, although the dissolution and liquidation of the community partnership was compelled by judgment of the Louisiana Court pursuant to mandatory statutory provisions and the judgment itself was based on the judicial recognition of the previously existing one-half ownership of each spouse in the community partnership assets.

[12]If, for example, the wife owns as her separate property a policy of life insurance on her husband's life and premiums are paid thereon out of partnership community funds, the husband must pay gift taxes on the entire amount of premium payments, since community funds are used to enhance the value of the separately owned property, even though the "gift" is, as to one-half, a "gift" to the wife of her own funds, and even though she may have paid an income tax on the same funds a few days previously. Yet, after having made the gift, the husband's estate, at his death, must pay an estate tax on the full proceeds of the policy owned by the wife and paid for in half by the wife's funds, on which the husband has paid gift taxes. Previously, insurance proceeds were included only to the extent that the decedent paid premiums on the policy so that, in the community partnership property states, only one-half of the insurance was taxable where the premiums were paid with community partnership funds. (*Lang v. Commissioner*, 304 U.S. 264; *Howard v. United States*, 125 Fed. (2d) 986.) But under Section 404 of the 1942 Act, page Ap. 2, *infra*, premiums paid with community partnership funds are considered to have been paid by the insured, unless, again, such funds are traceable to the compensation for "personal service" or separate property of the survivor. Similarly, if a husband in a community partnership state takes out a policy on his wife's life in his own favor, and pays the premiums from community partnership funds, her estate must pay tax upon the full policy proceeds, even though the policy is owned by the husband, and he pays for half of the cost.

out a divorce, for mismanagement, or where the marriage is dissolved by divorce, the tax is levied as it would have been prior to the 1942 amendment. If death occurs one moment after separation or divorce, only one-half of the property is taxed to the decedent. If death occurs one moment prior to separation or divorce, the whole may be taxed to the first to die.[13] This is perhaps the first time in history that a statute encouraging divorce or separation of partnership property has been passed.[14]

Where the spouses move to a non-community property state, and there invest the community partnership property brought with them, the law, upon the death of either, will regard the first to die as a tenant in common owning only one-half of the property, and limit the tax accordingly, whereas, if they remain in the community partnership property state, the whole will generally be taxed to the first to die. Thus one rule of taxation is applied in community partnership property states, and another rule, respecting the **same spouses** and the **same property,** is applied in the other states.

For example, the law of a new domicile will not apply the community partnership system as to property acquired after change of domicile, but it will recognize that the property previously acquired in Louisiana, or some other community partnership property

[13]Section 402 (b) (2) applies only to property held as community property. After separation or divorce, even if there is no partition in kind, the property is held as tenants in common and not as community partnership property.

[14]The temptations to wealthy person to separate or divorce in order to conserve some of their estate for their children is made apparent by the following: A community estate is $6,000,000.00; under the estate tax law, all of it may be taxed to the first to die, such tax to be $3,128,200.00. The second to die must then pay the tax of approximately $1,263,200 on his one-half interest. Thus the total tax on the death of the two spouses exceeds $4,300,000.00. By permanent separation or divorce, there will be at the death of the two spouses two taxes of approximately $1,200,000.00, or a total of $2,400,000.00, a tax saving achieved by separation of partnership property or divorce of approximately $2,000,000.00.

State, is owned one-half by each spouse, as tenants in common, and the wife will be recognized as owner of one-half of the community partnership property and property acquired with the proceeds of community property. (*Depas v. Mayo*, 11 Mo. 314, *Phillips v. Commissioner*, 9 B T A 153, *Succession of Popp*, 146 La. 464, 83 South 765, Solicitors Opinion 121, Internal Revenue Bulletin, Dec. 1921, Page 197; Restatement, Conflict of Laws, Sections 292 and 293; Beale, "Conflict of Laws" §292.1). Accordingly by the amendment of 1942 Congress made an amazing and arbitrary attempt to fix property rights in only the community partnership states for taxation purposes in the very teeth of the law of the states involved, while if the same property is removed to the other states of the Union, the latter states recognize the law of Louisiana and the property rights of the spouses; and Congress, following the law of the common law states, taxes the former community partnership husband and wife on the very basis that they would and should have been taxed on if the community property estate tax amendment had not been adopted. In short, Congress continues to recognize for estate tax purposes the law of common law states which recognize in common law terminology the law of Louisiana, but when dealing directly with Louisiana citizens and the same property, the Louisiana property law will be disregarded.

In common law states the separate and undivided ownership of the property and income of partners in limited or special partnerships are recognized by the Government in applying both the Federal Income and Estate Tax Laws. In Louisiana where the community partnership is substantially analogous to a special or limited partnership in common law states, the 1942 amendment is designed by legislative *fiat* to disregard

the separate ownership of husband and wife.[15]. In connection with the arbitrary discrimination resulting from the different treatment of voluntary partnerships, it is important to note that twenty-five common law states and the District of Columbia permit husbands and wives to form partnerships voluntarily (452 C.C.H. Federal Tax Reporter §1169.21).

In these common law states, husbands and wives may make voluntary partnership agreements which frequently accomplish the same result, by contract, that the public policy and law accomplishes in Louisiana. Where such a bona fide partnership agreement has been entered into between husband and wife in these common law states, the Commissioner of Internal Revenue has rec-

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[15]The Supreme Court of Louisiana in the *Succession of Wiener* said: "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state. * * * It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract."

In *Childers v. Johnson*, 6 La. Ann. 634, 641, decided in 1851, the Supreme Court of Louisiana, in discussing the community partnership, said: "This partnership, the intervenors, who are creditors of the community, have a right to consider as legal entity; like other partnerships, it must be contemplated as an ideal being, *etre moral*, distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the debtor of her husband for the $2000 expended for her benefit. She is the debtor of the community. She owed this debt before her marriage. The community derived no benefit from its creation. Instead of paying it with her own money, it has been paid with money of the community. * * * Is she permitted thus to enrich herself, at the expense of the community, and of *bona fide* creditors of that community? Clearly not. This results from that general principle applicable to all partnerships, which is, that a partner must account to the partnership for what he has drawn from it for his individual business and advantage. * * * "

In *Poe v. Seaborn*, this court said: "Powers of partners or trustees of a spendthrift trust furnish apt analogies."

ognized that each spouse may return his or her distributive share of the partnership income and is liable only for the tax upon such share. Numerous cases, both in the Federal Courts and before the Board of Tax Appeals, recognize that, under the common law system, separate returns of husbands and wives effecting a division of income may easily be arranged by any one of a number of legal transactions which have been sanctioned by the law.[16] The same recognition would have to be accorded logically to such legal relationships in connection with the application of the Federal Estate Tax Law.

But in Louisiana, none of the contractual transactions we have referred to above, which have been held legal in common law states, is legally permissible. Husband and wife in Louisiana cannot make contracts with each other or enter into partnership agreements.[17] Thus while the common law states, by a variety of legal

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[16]For example, an informal joint venture or partnership for the purpose of trading on the stock exchange has been recognized as legally authorizing husband and wife to return one-half of the profits each. *Tracy v. Commissioner* (C.C.A. 6th Cir.) 70 F. (2d) 93. Likewise an oral agreement that a partnership should exist in a lumber business between husband and wife, although the wife takes no active part in the business, will authorize separate returns, and, in the same case, a donation of a farm by the husband, which the husband subsequently rented from the wife, was authorized and the wife was permitted to return the profits from the farm. *Virden v. Commissioner,* 6 B.T.A. 1123. A simple declaration by the husband that he is purchasing certain property and that the ownership is to be divided equally between him and his wife authorizes the wife to return one-half of the profit resulting from a subsequent sale on her separate income tax. *Wright v. Commissioner,* 26 B.T.A. 21. In another case a husband gave his wife an interest of $100,000.00 in his business and entered into a partnership agreement with her in which the wife, as a special or limited partner, was to be entitled to 25% of the profits. The Court held this a valid partnership and permitted separate income tax retuns. *Walter W. Moyer,* 35 B.T.A. 1155. There are numerous other cases illustrating the same principle and rulings; *Humphreys v Commissioner,* 88 F. (2d) 430; *E. R. Ledbetter,* B.T.A. Dkt. No. 104852; *R. C. Bennett v. Commissioner,* B.T.A. Memo. Dkt No 101715; *A. G. Dickinson,* 23 B.T.A. 1212; *Dunham v. Commissioner,* 27 B.T.A. 1068; *Gillette v. Commissioner,* 18 B.T.A. 434; *In Re Bellingrath,* 3 B.T.A. 11; *First National Bank v. Commissioner,* 13 B.T.A., 1096, *Commissioner v. Barne's Estate,* 30 Fed. (2d) 289, affirming 7 B.T.A. 924; *Rose v. Commissioner,* 65 Fed. (2d) 616; *James R. Cray,* 7 B.T.A. 322.

[17]Louisiana Revised Civil Code, Articles 2446, 2329 and 1790.

transactions between husband and wife which have already been approved by the Government, permit the making of separate returns by husbands and wives and the application of the estate tax on the basis of their separate ownership, none of these methods accepted as legal in common law states is possible under Louisiana law.

Moreover, the voluntary partnership arrangement between husbands and wives in the common law states, referred to above, will not be affected or changed by the 1942 Community Property Estate Tax Amendment, because it only applies to so-called community partnership states, and is, therefore, intended to and actually does affect only eight community partnership states. The adoption of the 1942 Community Property Estate Tax Amendment, if upheld, will have the effect of permitting the taxation of one-half of the partnership property of husbands and wives who are voluntary partners in other states, while in Louisiana and the other community partnership states, where a partnership between husband and wife is created by law and called a "community partnership", the statute will require the estate tax to be imposed upon the community partnership property belonging to both the husband and wife, depending upon the accident of which spouse dies first. Hence, it would result that under the 1942 act what in a common law state is in reality community partnership property, although not technically defined as such, would be accorded the same recognition taxwise as was accorded to all community partnership property prior to the passage of that act, whereas community partnership property in community partnership states would for the first time be taxed otherwise.

The unconstitutional, arbitrary and discriminatory character of the 1942 Community Property Estate Tax

Amendment is discussed at some length in deFuniak, "Principles of Community Property", Volume 1, Section 255. The auther in the conclusion to his discussion, on page 719, says:

> "There can be no more justification for Congress saying that such an inherent principle of the law of the community property states shall be ignored and the income considered as separate property of the one earning it than there would be for Congress declaring that for purposes of taxation it will ignore the law of non-community property states and consider all earnings of one spouse as belonging equally to both."

It is apparent, therefore, that Section 402 (b) (2) applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates, and upon such estates alone. The statute (1) is wholly capricious, arbitrary and violative of due process of law, and (2) offends the geographical uniformity provisions of the Federal Constitution.

The 1942 Community Property Amendments Were Approved and Reported by the Ways and Means Committee without a hearing being given to representatives of the Community Partnership States.

Much is made in the Solicitor General's brief of what he styles the legislative history of the statutory provisions here in controversy. He omits to tell the Court, however, that five attempts between 1920 and 1942 were made to take away, by legislative *fiat*, the rights given to husbands and wives in community partnership states by their local laws, and that every such effort prior to 1942 to have Congress disregard, for tax purposes, the laws of the traditional community property states failed. Indeed, most of those efforts

died in committee, after a public hearing had been given to the opponents, and the unfairness and discriminatory nature of the proposed legislation had been submitted to and fully considered by the Congress. On two other occasions after exhaustive debate on the floor of the Senate, amendments designed to disregard the laws of the community property states for tax purposes were rejected when opposed because shown to be unfair, confiscatory and a gross discrimination against the community partnership states.

The favorable report of the Ways and Means Committee upon the 1942 amendments, emphasized in the Solicitor General's brief, was the result of a decision had by the committee behind closed doors in executive session shortly before the bill was reported to the House. No hearing was granted and no opportunity whatsoever was given to representatives of the community property states to discuss the unfairness and discrimination involved in the proposed legislation. The exigencies of war, and the need for its immediate financing, prevented that debate upon the floor which would have permitted the shedding of proper light upon the subject. This resulted in the statute being rushed through without the granting of a public hearing which is traditional in American legislative procedure.

The summary of the legislative history referred to will be found in Appendix C of this brief, pp. 24 *et seq.*.

THE STATUTE CANNOT BE SUPPORTED ON THE BASIS THAT ECONOMIC BENEFITS WERE SHIFTED AT DEATH

The statute cannot be supported constitutionally on the basis that economic benefits were shifted at death. True, if the husband dies first, there is cessation of his

management but the statute, neither in its terms nor in its operative effect is directed at cessation of management. We will hereafter show that where the wife dies first, there is no shifting of management, and obviously this test is not applicable under such circumstances. This theory is suggested by the Government to support its contention in support of the entire statute, when the circumstance of cessation of management occurs in only **one-half** of the situations covered by the statute, namely only when the husband dies first instead of the wife dying first. The statute itself does not mention or indicate that cessation of management or shifting of management is the basis of the tax. Moreover, the committee reports explaining the statute do not mention cessation or shifting of management as the basis or theory of the statute, but show clearly that ownership and the power of testamentary disposition is adopted as the occasion for the tax in certain cases; the origin of the property or the person to whom the property is "economically attributable" is adopted as the occasion for the tax in other cases; and the wholly insupportable presumption of dual ownership of the entire property is adopted as the rule in most cases.

But even if, for purposes of argument, we isolate the situations where the husband dies first and where there is a cessation of his management as managing partner of the community, it is clear that this cessation of management cannot constitutionally be made the subject of an estate tax.

We have shown in our summary of the rights of husband and wife under the Louisiana Community Partnership law (pages 12 to 20, *supra*) that the right of the husband is analogous to that of a managing partner of a **limited partnership** at common law or a

trustee of a spendthrift trust. The husband's limited agency, as this Court pointed out in *Bender vs. Pfaff*, 282 U. S. 127, is like any other agency, charged with the duty of honest and prudent management. The law of Louisiana gives to the wife an effective remedy against imprudence, mismanagement or dishonesty which might cause pecuniary loss to her, or to the community. She has the right at any time to bring about the dissolution of the community partnership and remove her husband as agent and manager of the community partnership on a proper showing of mismanagement or dishonesty and she is entitled to an accounting by the husband to obtain reimbursement for any losses or damages sustained as a result of his mismanagement or dishonesty.

In *Poe v. Seaborn*, 282 U.S. 101, 112, **this Court repelled the argument** that the agency of the husband was an attribute of property. Repeating its previous holding in *Warburton v. White*, 176 U. S. 484, the Court pointed out:

> "Power is not synonymous with right. The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner."

And when this Court came to the Louisiana case, *Bender v. Pfaff*, 282 U. S. 127, 132, it said:

> "While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. *Wolf v. Lowry*, 10 La. Ann 272; *Webb v.*

> *Bell*, 24 La. Ann 75; *Brown v. Smythe*, 40 La. Ann. 325, 4 So. 300. And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. *Hill v. Hill*, 115 La. 489, 39 So. 503; *White v. White*, 159 La. 1065, 106 So. 567."

Thus, the exclusive agency of the husband for the community partnership is no more a property right than is the managerial agency of a trustee or managing partner of a limited partnership, or of a tutor (guardian), over the property of his ward. The husband, under the law of Louisiana, owns his one-half, the wife owns her one-half. He manages the partnership property, because in the eye of the law, it is essential that that management be single and not divided. In Louisiana, as we have said, the management or agency of the husband could have been done away with entirely by antenuptial contract, or by the same species of agreement, the exclusive management could have vested in the wife. If no antenuptial provision to the contrary is made, the law of Louisiana, as a matter of ancient and settled policy, by legislative mandate creates and establishes the community partnership relationship with the husband as managing agent or partner. The wife's position in the community partnership is not materially different from that of any limited partner at common law where the articles of partnership provide for exclusive management by one of the partners. The wife's position is also substantially analogous to the beneficiary of a spendthrift trust under common law state statutes. This is not only the law of Louisiana as repeatedly stated by its Supreme Court, but this substantial analogy has been recognized by this Court. In *Poe v. Seaborn*, the Court

said: "Powers of partners or trustees of a spendthrift trust furnish apt analogies." There may be some formal and technical differences, but the substantial practical similarity in law and in practical fact cannot be controverted.[18]

The husband, as this Court pointed out in *Bender v. Pfaff, supra*, is, like any other agent, charged with the duty of honest and prudent management. As long as the husband's management is prudent and honest, the wife has nothing to gain by divesting him of the agency; on the contrary, such action would be to her injury. Upon what theory then can it be said that the wife secures an economic benefit by the husband's death? Of course, that event confers on her no property, for the half of the community partnership had always belonged to her. She has merely lost the services of her chosen agent. Her husband's death is a disaster, not an economic benefit. If such loss could be the occasion, within the Constitution, of the exaction of a federal tax, so likewise could the termination of the powers of the exclusive manager of a limited partnership, the death of a trustee of a spendthrift trust, or indeed, of any trustee, or the coming of age of a minor, in a common law state.

In *Warburton v. White*, 176 U.S. 484, 44 L. Ed. 555, and *Arnett v. Reade*, 220 U.S. 311, 55 L. Ed. 477, this Court distinctly held that the management and control of the husband in a community property state is not property, but that the wife's half interest in community property is an absolute property interest protected by the 14th Amendment. In these cases, this Court conclusively established the rule that under the Federal Constitution a husband having by state law the management of community partnership property may be de-

[18]See Note 16 *supra*.

prived of that statutory agency by state or federal law without compensation, and the management may be changed from time to time without violating the Constitution, because management is not property. On the other hand, this Court held that the wife, as owner of a half interest in community partnership property, cannot be deprived of that half interest by change of local statutory law in any way, because the wife has property and ownership which is protected by the 14th and 5th Amendments. The 1942 statute, therefore, apparently undertakes to tax as property that which this Court has held is not property, namely, the shifting of management, and at the same time the statute refuses recognition to that which this Court has held is property, namely, the wife's vested ownership of one-half of the community partnership property.

The decision in *U. S. v. Goodyear* C.C.A. 9, 99 Fed. 2d 523, illustrates the well-recognized rule of law that management is not property or an economic benefit as these terms are ordinarily understood in law. That case dealt with the California community law. In California, the wife had no vested or real ownership in community property until the enactment of the California Statute in 1927 giving the spouses equal undivided interests and ownership. A California husband conveyed to his wife "a present, existing and equal interest" in community property which had been acquired by him before 1927. When the husband died, the government attempted to include for estate tax purposes the half of the community property belonging to the wife on the theory that the husband's management as agent of the community was property and came within the Federal statute imposing an estate tax on all property of the decedent "to the extent of any interest therein of which

the decedent has at any time made * * * a transfer under which the transferor has retained for his life * * * the possession or enjoyment of * * * the property." The Court of Appeals, in denying the government's contention said:

> "Both spouses had possession and enjoyment of the property and owned the income therefrom, although the property was subject to 'management and control' by decedent. The terms 'management and control' are not synonymous with 'possession and enjoyment'. That one may manage and control property without either possession or enjoyment is illustrated by the situation where an agent manages real property for the owner. In such case although the agent may have absolute control in managing and renting the property and in collecting rents, the rents belong to the owner who enjoys them. We think that theoretically each spouse had possession and enjoyment of his particular interest. Decedent, therefore, did not possess and enjoy his wife's interest. If in controlling and managing the property, decedent transferred possession and enjoyment to a third person, the fruits received for such transfer were then owned by both spouses."

This Court again announced a similar principle and rule in *Reinecke v. Northern Trust Company*, 278 U.S. 339. Speaking through Mr. Justice (now Chief Justice) Stone, the Court said:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of

the tax was thus complete as soon as the trust was made."

In other words, it was argued that the reservation of the right of management when property was conveyed to a donee was a reservation of economic control and benefits equivalent to property rights, and that upon the death of the person reserving to himself these rights there was a shifting of these rights to the owner and donee of the property. This Court held that this was not a shifting of economic benefits.

So, in this case, the economic interest was the wife's from the moment the property was acquired. It was complete at that time and did not pass at the husband's death upon the mere cessation of his management because his management did not involve any shifting of economic benefits within the meaning of the law and its interpretation by this Court. It is hardly necessary to point out that it has never been suggested before in a community property state or in a common law state that the death of a trustee involves a shifting of benefits to the beneficiary of the trust that would justify including the beneficiary's property in the estate of the decedent trustee. It has never been suggested that, when a managing partner of a limited partnership in a common law or community partnership law state dies, the deceased partner's estate should be taxable on the basis of adding the value of the partnership interest of the surviving partner or partners. It has never been suggested that, if a tutor or curator or guardian dies, his estate should pay a tax based on the addition to his estate of the value of the estate of the minor or interdict.

The summary of the ownership and rights held by the wife, when contrasted to the limited, restricted and circumscribed agency powers of the husband under the law

of Louisiana (pages 12 to 20, *supra*) is sufficient to show that the husband's death confers no real or substantial economic benefits on the wife with respect to that undivided one-half interest in the partnership property which she has always owned.

The cases decided by this Court, cited herein, make clear that something more than mere management must pass. There must be some shifting of substantial economic interest in the whole property to justify an estate tax measured by the whole of the property. It will not do to select, as a matter of technical argument, one "straw" from the "bundle of rights" that go to make up ownership (when the "straw" is so unsubstantial that it may be changed as often as state lawmakers see fit, or by contract or otherwise without affecting ownership as this Court has decided), and to tax that "straw" on the basis of the value of the whole "bundle."

We submit that the statute clearly offends the **due process** clause of the 5th Amendment.

WHEN THE WIFE DIES FIRST, THERE IS NO BASIS FOR THE ARGUMENT THAT THERE IS CESSATION OF MANAGEMENT OR SHIFTING OF SO-CALLED ECONOMIC BENEFITS.

We have shown that the argument of the Solicitor General that the so-called cessation of management, when the husband dies first, was not intended by the Act of Congress as a basis for the tax, and if it was intended as a basis for the tax, it does not constitutionally justify the tax. The fallacy and inadequacy of the Government's argument in this connection becomes even more apparent when the wife dies first. There is not

even the cessation of bare management at her death, and certainly what takes place then is no so-called shifting of economic benefit to the husband or to the husband's half interest in the community partnership estate.

The application of the statute is not limited to the case where the husband dies first; its language compels its equal application where the husband is the survivor. It expressly provides that there **shall** be included in the taxable estate of the decedent: "the interest therein held as community property by the **decedent and surviving spouse"**. Neither "decedent nor" "spouse" has particular gender. The "decedent" may well be the wife, the "surviving spouse" the husband. In such case, no one could be heard to contend that the husband had acquired any rights by his wife's death. She had no management of either half interest in the community partnership property prior to her death. After her death, the husband continues to manage his half interest. He has, in fact, lost whatever management and control he possessed over the wife's half interest during the marriage. Yet the statute operates equally in the assumed case as under the facts here involved. Moreover, as pointed out by the Supreme Court of Louisiana, the wife may have died testate. She may have willed all her property to a stranger or to an enemy of the husband or to a paramour. In that case, the husband whose efforts had contributed so effectively to the building up of the community estate, finds himself still the owner of his original one-half, it is true, but with no power whatsoever over the other one-half; on the contrary, with the loss of its management and burdened with co-owners with whom he may be in utter disagreement.

Yet, when the wife dies, the statute wou[illegible] include

the husband's half of the community partnership property, which he always has owned, in imposing the tax upon the wife's half interest in the community partnership estate. In such a case, if the converse of the government's argument is logically applied, the tax is imposed because, instead of being invested by his wife's death with a right of management, the husband has lost whatever right in that respect that he had before possessed.

If the government suggests that the cessation of management is the basis for constitutional authority to impose a tax on the wife's share of the community partnership when the husband dies first, it must to be consistent explain why, when the wife dies first and there is no cessation of management of his half and an actual loss of management over his wife's half of the community partnership, the husband's share of the property should nevertheless be added to the wife's share and estate in measuring and imposing the estate tax. But the government cannot and has not supplied any consistent, much less, convincing explanation.

Obviously, in an endeavor to avoid the ineluctable conclusion that the statute is void because not separable, and that the reason for its imposition is wholly wanting in the case of the predecease of the wife, the Solicitor General suggests in his brief (page 53) that the death of the wife frees the husband "from the fetters deemed substantial in *Bender v. Pfaff.*" We must confess inability to understand. The Solicitor General does not name the fetters. If he means, as he must, that the husband becomes freed from responsibility for mismanagement, or that he is relieved from that accountability which is the concomitant of agency, he is but emphasizing the mere managerial powers of the husband with respect to the

wife's half interest in the community partnership property. An analysis of *Bender v. Pfaff*, and of the Louisiana cases, would show that that is all he could possibly mean. For there are never any "fetters" on the husband in **respect of his own half** of the property, either during the community partnership or after its dissolution, and the death of the wife consequently could not, under the widest stretch of the imagination, operate to increase his rights over **his own** undivided half.

THE STATUTE IS NOT SEPARABLE

The government cannot escape its dilemma by suggesting that the statute is separable. We have already pointed out that the statute does not use the words **husband** or **wife.** It refers to "decedent", and "spouse", which have no gender and obviously show that the statute was intended to apply to either husband or wife, according to which spouse died first. On settled principles, it is clear that if the statute be invalid in the case of the predecease of the wife, it is equally invalid in the case where it is the husband who died first.

> "By accepted canons of construction the provisions of the act in respect of this tax are not capable of separation." *Bowman v. Continental Oil Co.,* 256 U.S. 648.

Congress in the 1942 Amendments assumed to deal with the community as an entity. It carefully displayed its intent in the use of terms indifferently applicable to husband and wife. It provided for inclusion in the taxable estate of any "decedent" of the interest held as community property by the "decedent" and "surviving spouse." Nowhere in the statute may there be found aught upon which to hang argument that Congress would have legislated for this inclusion in the case of the

husband only, or in the case of the wife alone. It is an all-inclusive provision, intended to follow the analogy of the inclusion of the entire property held by "tenants by the entirety", or by "joint tenants". Even if Congress could have legislated validly to include the entire community partnership property in the case of the death of the husband, its attempt here so to include the whole community partnership property in the case of the death of either of the spouses renders the entire enactment unconstitutional.

As this Court said in *Butts v. M. & M. Transp. Co.*, 230 U. S., 126, 134, quoting from *United States v. Reese*, 92 U. S. 214:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. * * * The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its Constitutional limitations, and attempts to do that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments * * *. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

The doctrine of *United States v. Reese*, is fundamental in constitutional jurisprudence. See *Trademark*

Cases, 100 U.S. 82, 99; *Poindexter v. Greenhow,* 114 U.S. 270, 304; *Baldwin v. Franks,* 120 U.S. 678, 685; *Pollock v. Farmers Loan & Trust Co.,* 158 U. S. 601, 636; *Allen v. Louisiana,* 103 U.S. 84; *United States v. Harris,* 106 U.S. 641; *James v. Bowman,* 190 U.S. 127, 140; *United States v. Ju Toy,* 198 U. S. 253, 262; *Dorchy v. Kansas,* 264 U.S. 286, 290; *Yu Cong Eng v. Trinidad,* 271 U.S. 521.

Decisions from the Circuit Courts of Appeal to the same effect are almost without number. Well-considered decisions will be found in *Pflueger v. United States,* 121 Fed. (2d) 732, 735; *Cella Com. Co. v. Bohlinger,* 147 Fed. 419, 8 L.R.A. (NS) 537,542.

It cannot be argued that one may complain only when his own constitutional rights are invaded, and that, consequently, decisions upon the constitutional issue should be reserved until there be before the Court a case where the wife predeceased her husband in community.

Such an argument, if made, would ignore what is fundamental; that no tax may be exacted without a statute so providing, and that no statute conflicting with the Constitution may have the effect of law.

The argument, moreover, is unsound because it is to the will of Congress, as expressed in the statute, that we must look to determine whether legal authority for the imposition of a tax exists. If the statute by any construction would have been valid had it applied to the husband alone, it must by the same reasoning be held invalid when used as the basis for measuring the estate tax on the predecease of the wife. If Congress has so enacted the statute as to require judicial legislation to separate its effect in the two cases, i. e. in the death of the husband and in the death of the wife, then the

statute falls as a whole, and there is no authority for the inclusion of the entire community in the case of the death of either of the spouses.

This conclusion necessarily flows from a multitude of decisions by this Court.

In *United States v. Reese*, 92 U.S. 214, the statute held unconstitutional might constitutionally have been enacted had its effect been confined to the offense for which the defendant was indicted. Because, however, its effect extended to a field in which Congress had no power, this Court held it null as a whole, and avoided the indictment:

> "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, if there be any such, from that which is not."

The *Reese* case was followed in the *Trademark Cases*, 100 U.S. 82, where this Court rejected the contention that the trademark statute might be sustained in part, because of the power of Congress to regulate trademarks used in commerce with foreign nations and in interstate commerce.

Again the same doctrine was announced in *Allen v. Louisiana*, 103 U.S.80, and in *United States v. Harris*, 106 U.S. 641.

In the leading case of *Poindexter v. Greenhow*, 114

U.S. 270, the same issue was presented in a civil proceeding. There this Court said, page 305:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In *Baldwin v. Franks*, 120 U.S. 678, Congress clearly had the power to penalize the specific offense of which the defendant was accused. But because the statute, in addition, covered other acts whose punishment was not within the power of Congress, and because a reading of the Statute demonstrated that its provisions were inseparable without judicial legislation, the Court held the entire statute unconstitutional and discharged the defendant.

The precise point was again decided in *James v. Bowman*, 190 U.S. 127, 142.

As said by Mr. Justice Holmes in *United States v. Ju Toy*, 198 U.S. 253, 262:

> "The relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

The whole subject is reviewed in *Butts v. M. & M. Tansp. Co.*, 230 U.S. 126, where, again, the punishment of the specific offense would have been within the competency of Congress, but where the statute, in general terms, included offenses not within its power of legislation.

In *Yu Cong Eng v. Trinidad*, 271 U.S. 521, the doctrine of the *Reese* case was again involved, this Court saying:

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

In the *First Employers' Liability* case, *Howard v. I. C. R. Co.*, 207 U.S. 463, there was at issue the constitutional validity of the Act of Congress of June 11, 1906, 34 Stats. 232. The employee was killed while serving as a fireman on a locomotive actually engaged in moving an interstate commerce train. It was conceded that Congress had the power to legislate with respect to employers' liability as to employees actually engaged in interstate commerce (as this Court subsequently had occasion to hold in the *Second Employers' Liability* case, *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U.S. 1). This Court, however, held that the statute unambiguously covered all operations, in intrastate as well as in interstate commerce, thus including a subject matter clearly beyond the power of Congress. The Court, therefore, denied the plaintiff relief, although the decedent's injury was occasioned while he was engaged in interstate

commerce, as to which Congress could validly have legislated.

In response to the argument that the statute might be sustained as to interstate commerce, this Court said:

> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

Upon a consideration of these authorities, it is, with respect, submitted that all of the arguments advanced to support the statute upon the theory that the wife comes into possession of a right upon the death of her husband must wholly fail even if they had otherwise the semblance of substance, when it is considered that the statute operates equally upon the death of either spouse, and that the prior death of the wife can, in no sense of the word, be said to confer any right of any kind or character upon the husband.

SECTION 402 (b) OF THE REVENUE ACT OF 1942 IS ARBITRARY, CONFISCATORY AND CAPRICIOUS IN THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The statute, as amended by Section 402 (b) of the Revenue Act of 1942, clearly violates the principle announced in *Hoeper v. Tax Commission*, 284 U.S. 206, that "any attempt * * * to measure the tax on one person's property * * * by reference to the property of another is contrary to due process of law." This Court, in the *Community Property* cases (282 U.S. 101, 118, 122, 127, 792) clearly recognized that the wife is a full and equal owner with her husband in community partnership property. The Supreme Court of Louisiana in the *Succession of Wiener*, 203 La. 649, 14 So. (2d) 475, decided June 21, 1943, pointed out that the surviving wife "is the half partner and owner of all acquisitions made during the existence of the marriage". In *Poe v. Seaborn*, 282 U.S. 101, this Court recognized that "the powers of partners, or of trustees of a spendthrift trust, furnish apt analogies". The Louisiana Supreme Court in the *Wiener* case points out that "there is no substantial difference between her (the wife's) interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to the managing partner."

Since it is settled, as a matter of local law, that title to community property vests *eo instanti* at its acquisition equally in husband and wife, it would seem necessarily to follow that the case presented is no different from that which would be involved in an attempt by Congress

to include in the estate of any tenant in common the value of the entire interest in all property in which he had co-owners.[19]

The inclusion, therefore, in the estate of the husband of property which he never owned, with the result of imposing upon his heirs a tax liability measured by the value of that which they acquired by his death, **plus** the value of that which belonged to someone other than the decedent, would be directly inconsistent with the due process guaranteed by the Fifth Amendment, as interpreted by this Court.

Therefore, this statute violates the principle announced in the *Hoeper* case in that it measures the tax on one person's property by reference to the property of another, just as it would violate due process to tax one partner at death on the surviving partner's interest, or to tax a beneficiary upon the death of a trustee where such trustee never at any time owned or had any economic interest in the trust properties. Since "there is no substantial difference" between the interest of each spouse in community partnership property and the interest of any partner in partnership property or the interest of a beneficiary in trust property, the statute, in measuring the tax of the first to die by the full value of the surviving spouse's interest arbitrarily takes property without due process.

In the *Hoeper* case, a Wisconsin statute required the filing of a joint return by husband and wife for state income taxes; the combined total of income of husband and wife being then taxed according to graduated scale.

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[19]Of course, it is fundamental that each state has the power to determine for itself the manner and conditions upon which property situated within its boundaries may be acquired, enjoyed and transferred. *Pennoyer v. Neff*, 95 U.S. 714, 722. It has always been considered inconceivable that the Federal Government has power to vary the law of descent in any state. *The Federalist*, Number XXXI.

The statute was attacked as violative of the Fourteenth Amendment. Reversing the decision of the Supreme Court of Wisconsin, 202 Wis. 493, 233 N.W. 100, which had sustained the constitutionality of the act upon the ground that the statute merely retained or re-established what was formerly an incident of the marriage relation, this Court said:

> "The question presented is whether the state has power by an income-tax law to measure his (the husband's) tax, not by his own income, but, in part, by that of another. To the problem thus stated, what was said in *Knowlton v. Moore*, 178 U.S. 41, 77, is apposite:
>
> > 'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'"

After thus referring to the observations in *Knowlton v. Moore*, the Court concluded:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." (Compare *Nichols v. Coolidge*, 274 U.S. 531, 540.)

In *Nichols v. Coolidge*, 274 U.S. 531, this Court expressly recognized the controlling effect of the Fifth Amendment upon the power of Congress in the levying of an inheritance tax. In that case, the Court held that so much of paragraph 402 (c) of the Revenue Act of 1919 as required the inclusion in the gross estate of a decedent, for the purpose of estate taxation, of the value of property donated by the decedent prior to its passage, directed a taking of property without due process of law. The Court said:

> "We must conclude that 402 (c) of the statute here under consideration, insofar as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Later, the statute stricken in *Nichols v. Coolidge*, was amended so as to provide merely that any transfer made within two years prior to the death of a decedent should be deemed to have been made in contemplation of death and, therefore, was to be included in the estate for the purpose of measuring the estate tax. The constitutionality of this statute under the Fifth Amendment came before the Court in *Heiner v. Donnan*, 285 U.S. 312. Upon the express authority of the *Hoeper* case, the Court said:

> "The restraint imposed upon legislation by the due process clauses of the two amendments in the same. *Coolidge v. Long*, 282 U.S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. *Nichols v. Coolidge*, 274 U.S. 531; *Brushaber v. Union P. R.*

Co., 240 U.S. 1, 24, 25; *Tyler v. United States*, *supra*, (281 U.S. p. 504)."

Then, after discussing the *Hoeper* case, the Court said:

> "In substance and effect, the situation presented in the *Hoeper* case is the same as that presented here. * * * **The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.** Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. **Such an exaction is not taxation but spoliation.** 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' *United States v. Baltimore & O. R. Co.*, 17 Wall. 322, 326." (Emphasis ours.)

And, as aptly remarked by Judge Learned Hand in *Frew v. Bowers*, 12 Fed (2d) 625, 630 (C.C.A. 2):

> "Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grevious injustice."

See also *Lewellyn v. Frick*, 268 U.S. 238.

The statute here is much more capricious and much more arbitrary than the statutes considered in any of the foregoing cases. As shown above, it adopts wholly

arbitrary and confiscatory tests, applicable only in the community partnership property states. It not only measures one person's tax by another's property, it treats two persons as owning at the same time the same property; it completely disregards States rules of property and applies one rule of taxation when one spouse dies, and another rule when the other dies. It makes the incidence of the tax depend on the sheer accident of which of the two spouses should happen to die first. It creates double taxation and will completely confiscate many estates.

The statute is also unconstitutional because it creates wholly arbitrary and capricious presumptions contrary to both law and fact. As stated above, the bulk of community partnership property on hand at the death of either spouse will constitute partnership property not directly traceable to compensation for "personal services" or separate property of either spouse. (See pages 36 to 39, *supra.*) Thus, in the majority of cases, the statute, by taxing the full value of property to the first spouse to die, creates the wholly arbitrary and capricious presumption that the first spouse to die owned the whole of the community partnership property. (Louisiana Civil Code, Article 2405, Appendix p. 11 *infra.*) The fact, controlled by local law, is directly to the contrary. The property is owned one-half by each spouse. The arbitrary presumption upon which the statute proceeds is contrary to the facts in this case. Where community partnership property is acquired through the creation of a community partnership debt, or where a storekeeper and his wife build up an estate through their joint efforts, or a farmer and his wife through their joint efforts till the soil, it is utterly contrary to the fact, even if economic contribution were the controlling factor, to say that the entire community partnership property is owned by the

first spouse to die; that it is owned entirely by the husband, should he die first, and that it is owned entirely by the wife, should she die first. There is certainly no rational connection between the real facts and the facts presumed. (*Tot v. United States*, 319 U.S. 463, 87 L. Ed. 1519.) As stated by this Court in *Bailey v. Alabama*, 219 U.S. 219, "A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment." See also *Manley v. Georgia*, 279 U.S. 1, 5-6. Certainly, the presumption in this case that two persons at the same time own in its entirety the same property is much more capricious, arbitrary and unsupportable than the two-year presumption, declared invalid in *Heiner v. Donnan*, *supra*, and even the six-year presumption invalidated in *Schlesinger v. Wisconsin*, 270 U.S. 230. See also *Hall v. White*, 48 F. (2d) 1060; *Guinzberg v. Anderson*, 51 F. (2d) 592; *American Security Company et al.*, 24 B T A 334; *State Tax Commission v. Robinson's Executor*, 234 Ky. 415, 28 S W (2d) 491.

Under existing authorities it cannot be argued that Congress could retroactively impose an estate tax with respect to an irrevocable outright gift of property made by the decedent to a member of his family, where such a gift was neither in contemplation of, nor intended to take effect in possession or enjoyment, after death. (*Nichols v. Coolidge*, 274 U.S. 531.) The 1942 statute does even more than this. It undertakes to ascribe significance to the origin of wealth without any regard to the ownership of property either at origin or at death.[20]

[20]The attempt by the statute to attribute importance to "compensation for services actually rendered" by one spouse or the other is, of course meaningless, since under community property law, community property is not earned or derived by the spouse whose services may have preponderated in producing it, but by the community. As this Court said in *Poe v. Seaborn*, *supra*: "But here the husband never had

It undertakes to tax an individual merely because his action may have in fact given rise to that wealth and also in cases where it did not give rise to it all, although at the time of its acquisition he did not own the property and, at the time of his death, he possessed no economic interest therein. Indeed, this statute contains all the pernicious elements of a retroactive law. For the first time it undertakes to make the estate tax depend on the source of funds used in acquiring property many years prior to death. It imposes upon spouses in the community partnership property states the impossible burden of tracing back through the many transactions of a long lifetime the origin of each item of property on hand at death. Unless this origin is traced into the separate earnings or the separate property of the survivor, the estate of the decedent must pay the tax on the whole. Even if a successful tracing to the survivor could be accomplished, the decedent's estate must, nevertheless, pay the tax on half. Never before has it been intimated that husband and wife must between themselves maintain accurate records of their individual transactions. This statute then takes them entirely by surprise and by reaching back and attaching tax significance to methods by which property was acquired many years prior to death, it contains all of the unjust elements of a retroactive tax. (*Cf. Frew v. Bowers*, 12 F. (2d)

[20]—(Continued)

ownership. That is in the community at the moment of acquisition." The Louisiana Supreme Court in the *Succession of Wiener*, *supra*, clearly points out that whatever is acquired by the community is the "product of the reciprocal industry and labor of both husband and wife. * * * In Louisiana, the civil law prevails, and the humane and realistic theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity." See also *Succession of Costa*, 19 La. Ann. 14.

625, 630, and see Stone, J., dissenting in *Heiner v. Donnan*, *supra*, 285 U.S. 312.)

As stated in *Nichols v. Coolidge*, *supra*, "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions not testamentary in character and beyond recall."

We submit that the statute clearly offends the due process clause of the Fifth Amendment.

THE STATUTE CANNOT BE JUSTIFIED BY THE TYLER, JACOBS OR MOFFITT CASES

The Committee reports upon the 1942 statute show that reliance, as to the constitutionality of the statute, was placed upon the *Tyler* case, 281 U.S. 497 (Estates by Entirety), and the *Jacobs* case, 306 U.S. 363 (Joint Tenancy). But these cases do not support the amendment. The statute involved in those cases concerned gratuitous transfers by the decedent, either mediately or immediately, to his wife or to others as a tenant by the entirety or as a joint tenant with him. It dealt only with property which had originally belonged to the decedent. It dealt with such property only when the decedent in his lifetime had made a transfer thereof by gift or without consideration, retaining the right of survivorship always attached to such estates. This particular statute had been adopted to stop loop-holes and prevent estate tax avoidance. Thus, in the cases the committee erroneously relied upon, the Court had before it merely the question of including in the decedent's estate a gift by the decedent, which would not ripen into a complete gift until his death. The transfer was to take full effect in possession and enjoyment only on and because of

death. By gift, the decedent had created an estate which, if his joint tenant died first, would return in full to him and which required his prior death to confer on his donee the full possesison, use or enjoyment of the property. Thus, the statutory provisions dealing with joint tenancy and tenancy by entirety were directed at, and reached, transfers testamentary in character, in which substantial economic rights were retained in the donor for his life. The decisions in the *Tyler* and *Jacobs* cases are based upon five grounds, none of which applies in the case of community partnership property.[21]

1. In a "joint tenancy" and a "tenancy by the entirety" there is only one title and one tenure. Each joint tenant is the owner of the whole title, not an undivided part of it. As the Court said in the *Jacobs* case:

> "It is one estate because of the 'amiable fiction' of the common law under which ownership of a husband and wife in tenancy by the entirety is deemed a single, individual unity and each owns all and every part of the property so held. By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the co-tenant, * * * ."

The husband and wife in the community partnership have each an immediate, present, undivided ownership in the community partnership property and are "tenants in common". In a "tenancy in common", if there are only two tenants, there are two estates—one estate consists

[21]In the *Estate of Rogers v. Helvering*, 320 U.S. 410, 88 L. Ed. 135, Mr. Justice Frankfurter, speaking for the majority of the Court said: "For the purpose of ascertaining the *corpus* on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by decedent, values which but for such dispositions could not have existed."

of an undivided one-half interest and ownership in the property, and the other estate consists of the other undivided one-half interest and ownership in the property. This ownership of the spouses in Louisiana is not acquired from each other. There is no transfer to the community for the wife or for the husband. A "tenancy in common" arises by virtue of the community partnership law of Louisiana at the very moment the property is acquired by the community partnership.

2. The second important and significant characteristic which distinguishes a "joint tenancy" or "tenancy by the entirety" from a "tenancy in common" is the right of "survivorship". There is no right of testamentary disposition in either 'joint tenant" or in either "tenant by the entirety" and the property subject to the "joint tenancy" or the 'tenancy by the entirety" does not descend to the heirs of either tenant. Under the theory of "survivorship" there is no transfer of property or any succession under the theory of survivorship. If one of the "joint tenants" or "tenants by the entirety" dies, the other tenant becomes owner of the whole title and estate and the heirs of the deceased tenant have no right or interest in the property. This fundamental and distinguishing characteristic of a "joint tenancy" and a "tenancy by the entirety" was emphasized and pointed out in the *Jacobs* case when this Court said "**survivorship** is the predominant and distinguishing feature of each". On the contrary, in the case of a "tenancy in common", since each tenant is the vested owner of an undivided one-half of the property and each has a separate estate as undivided owner in the property, either tenant may dispose of his undivided share of the property by a will, and upon the death of either tenant in the absence of a will, the heirs of the deceased tenant take

decedent's undivided share of the property by inheritance.[22]

3. In the *Tyler* and *Jacobs* cases, death resulted in enlarging the survivor's property rights in all property used to measure the tax. Until such death, the survivor was not the complete owner of any share of the property; the legal rights of the decedent reached every part thereof. Death, therefore, became the generating source of important and definite accessions to the survivor's property rights. In contrast, the death of a community partnership spouse does not generate added property rights in the survivor's one-half of the property. If the wife should die first, nothing—not even in the nature of management—passes from the deceased wife to the living husband with regard to the surviving husband's share of the property. Yet the wife's estate under the 1942 amendment would, in most instances, be subjected to a tax on all of the husband's property. When the husband dies first, no rights devolve upon the wife unless it be said that she is rid of the bare managerial rights over her property theretofore held by her husband. We have already shown that these are not substantial rights in any economic sense and that a shift in the power to manage property may not be made the occasion of a tax

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[22]In support of the above statements in connection with the essential legal distinctions between a "tenancy in common" and a "joint tenancy" or "tenancy by the entirety", see American Jurisprudence "COTENANCY", Sections 6, 7, 8, 12, 15 and 86.

It is interesting to note that the "joint tenancy" and "tenancy by the entirety" are technical tenures of property which are the relics of the medieval common law in England. They are in disfavor in the United States and their effect and application have been modified by statute. In this connection see Section 12 of 14 American Jurisprudence: "Statutory Restrictions.—Whatever may have been the causes that led to the development of the joint estate or what recommended it to our ancestors of the feudal period, it is undeniable that it is now in disfavor, both in America and in England. The policy of American law is opposed to survivorship, and, in accordance with this policy, legislation abrogating the common-law rule above mentioned and modifying or abolishing the doctrine of survivorship has been enacted in virtually every state. These statutes commonly provide in effect that all grants and devises of lands made to two or more persons shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."

measured by the value of that property managed. (See pages 57 to 65.)

4. In the *Tyler* and *Jacobs* cases, all of the property came mediately or immediately to the tenancy as a pure gift from the decedent. Manifestly, this is not true of community partnership property. The character of community attaches to the property at the very moment of acquisition and both husband and wife are powerless to prevent this result even if they then wanted to; the character of community does **not** attach because of a gift or by the voluntary choice of either or both husband and wife. Considering the nature of that common ownership which grows out of the marital partnership in Louisiana, neither the *Tyler* nor the *Jacobs* case may serve as authority for sustaining the statute under attack, because the interest of the wife does not arise out of a gratuitous title. It is as much an onerous title as is the interest of the husband.

In the eye of the law, the carrying out by the wife of her portion of the marital duties, is the complete economic equivalent of the husband's carrying out his portion of the marital duties despite the fact that these duties may consist of exertions in the field of trade, industry or commerce. Hence as a matter of that public policy which governs the tenure of property, the basic civil law of the State decrees that all property acquired by either spouse, by onerous title, is owned equally and jointly by each. With that principle, Congress cannot interfere.[23]

[23]Before the adoption of the Constitution, it was pointed out in *The Federalist*, No. 31: "Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined), the Federal Legislature should attempt to vary the law of descent in any State, would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?" We might well substitute "the law of ownership or tenure of property", and the principle would be identical. See the observations of this Court in *Pennoyer v. Neff*, 95 U.S. 714, 722.

It, therefore, is clear that under the law of Louisiana, the wife's interest does not proceed from a gratuity, nor is it one whereof the husband's death is the "generating source". She owns her undivided one-half interest *ab initio*, and her ownership vested in her by the same title as that by which her husband acquired his interest and for the same consideration as that through which her husband acquired his interest.[24]. As expressed by Louisiana Civil Code, Article 2402:

> "The period of time (i. e. during marriage) when the purchase is made is alone attended to, and not the person who made the purchase."

5. In the *Tyler* and *Jacobs* case, the statute (there dealt with) was a means appropriate to the legitimate aim of Congress of preventing tax avoidance, in whole or in part, by *inter vivos* donation of the property of one to another. This was just a basis for the decisions, but it has not the remotest application to community partnership property.

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[24] Apparently, in an attempt to bring the amendment of 1942 within the reasoning of the *Tyler* and *Jacobs* cases, the writer of the statute inserted a provision seeking to except from the community property falling into the estate of a deceased spouse "such part thereof (i. e. of the community) as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the suviving spouse."

This provision certainly evinces an entire misconception of the law of Louisiana because "compensation for personal services actually rendered" falls into the community (Civil Code, Article 2402) regardless of whether such services be rendered by the husband or by the wife, living together as such. Argument for appellant based upon Article 2334 of the Civil Gode must be rejected in view of the decisions of the Supreme Court of Louisiana in *Houghton v. Hall*, 177 La. 238. *Succession of Manning*, 107 La. 456; *Gastauer v. Gastauer*, 143 La. 749; *Hellberg v. Hyland*, 168 La. 493; *Ford v. Brooks*, 35 La. Ann. 157.

Moreover, where separate property of the surviving spouse has been used for the benefit of the community, that into which it has been converted is community property, leaving its former owner merely a creditor of the community at its dissolution: "It is well settled that where the separate funds of one spouse have been invested in property for the community or otherwise expended for the benefit of the community, such spouse becomes a creditor of the community to that extent." *Succession of Merrick*, 35 La. Ann. 296; *Gee v. Thompson*, 41 La. Ann. 351; *Sharp v. Zeller*, 110 La. 61, 72; *Succession of Watkins*, 156 La. 1000, 1004; *Succession of Goll*, 156 La. 916.

Nor is *Moffitt v. Kelly*, 218 U.S. 400, relied on by the Solicitor General, in anywise controlling. There the issue was the validity under the Fourteenth Amendment of an inheritance tax statute of California as applied to the assessment of a tax against the interest of a surviving widow in community property.

It should be observed that the law under consideration was a State (succession), not a Federal (estate tax) statute; and that the case arose at a time when the law of California fell far short of being a community system of the type that has always prevailed in Louisiana, and is now prevailing in California. At that time, as the decisions of this Court, in the *Robbins* (269 U.S. 315) and *Malcolm*, (282 U.S. 792) cases, and of the 9th Circuit Court in *Wardell v. Blum*, (276 Fed. 226)[25] show, it was well settled that the wife had no real ownership in one-half of the property. She had an expectancy only, and this expectancy was "vested" merely in the sense that the husband could not disinherit her. But the wife was not an equal owner with the husband, and she had no power of testamentary disposition over any part of the community property if she died first. The property was the husband's whether she lived or died, subject only to the provision that he must leave her one-half at his death. The *Moffitt* case, therefore, does not in any manner sanction or approve a statute of the kind here under consideration. The State inheritance tax law under consideration in the *Moffitt* case did not, as does the Federal Estate Tax Law here involved in this case, undertake

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[25]Subsequent legislation changed the status of the wife *quoad* her interest in the community, so that the federal inheritance tax (at least, prior to the statute here in question) no longer applied to include the wife's interest in the valuation of the husband's estate. *Wardell v. Blum*, (CCA 9th) 276 Fed. 226, (*certiorari* denied 258 U.S. 618). And in the subsequent case of *United States v. Malcolm*, 282 U.S. 792, this Court recognized the controlling effect of the change in the local law in California, by applying to the incidence of the tax on community income the doctrine of *Poe v. Seaborn* and *Bender v. Pfaff*.

to treat the husband and wife as if each owned all of the property at the same time. It did not attempt to tax the first of the two spouses to die on the whole of the community partnership property. It did not make the tax depend on the sheer accident of which spouse died first. It did not provide for taxing the wife at her death on any part of her property, because under the California law, as it then was, the wife did not own any interest in the property and had no power of testamentary disposition over it. The California statute involved in the *Moffitt* case did not at one and the same time both recognize and deny the property rights of the two spouses. The statute did not create presumptions, contrary to law and to fact, that husband and wife at the same time each owned all of the identical property. Consequently, the *Moffitt* case in no wise puts the stamp of approval on a statute of the kind here under consideration. It is true that a dictum in the opinion states that the State could select, as the subject for taxes, the cessation of the possession and enjoyment of the property at the husband's death, even though under California law her expectancy was vested only in the sense that he could not disinherit her. But this does not mean that the Federal Government can select, as its subject for taxation, the bare cessation of management where ownership is vested in another, nor did the Court there so decide. There is a difference between the cessation of possession, use and enjoyment, i. e., a cessation of property interest, and a bare cessation of the management of property belonging to another. The *Moffitt* case certainly did not hold that Congress could make the bare cessation of the management of another's property the occasion for an estate tax.

That the statute involved in *Moffitt vs. Kelly* was a succession tax, and not an estate tax, was pointed out

in *In Re Miller's Estate*, 184 Calif. 678, 195 Pac. 415, 16 A.L.R. 694, and in *Stebbins v. Reily*, 268 U. S. 137, 143. Consequently, the utmost application that could be made of the *obiter* is that it dealt with the right of a state to impose a tax on the surviving wife, because of her having received a thing of value at the death of her husband. There was no question there of the imposition of an estate tax, i. e. one whereby the burden falls upon the widow and heirs of the decedent, measured both as to valuation and as to rates by the addition of what had been transferred by death of property never belonging to the decedent.

Moreover, the opinion of this Court in the *Moffitt* case should be read in connection with the opinion of the Supreme Court of California in the same case. *In re Moffitt's Estate*, (Cal.) 95 Pac. 653. The Inheritance Tax Law of California, quoted in the latter opinion, levied a tax upon "all property which shall pass by will or by the intestate laws of this state from any spouse who may die seized or possessed of the same". The wife's portion of the community estate was included as a part of the property of her deceased husband in computing inheritance taxes under this act. The question, and the only question, presented, therefore, was whether the interest of the wife in the community property passed "by will or by the intestate laws of this state from any person (the husband) who may die seized or possessed of the same." Upon this question the Supreme Court of California said:

> "After painstaking investigation and review, and after the fullest deliberation, this court in *Re Burdick* determined and held, as it declared in *Spreckels vs Spreckels*, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here ad-

vanced against the conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. * * * Thus the Legislature is presumed to have enacted it with full knowledge that this court *in banc*, not once, but repeatedly, have declared that the wife did take her share of the community property upon the death of her husband by succession as his heir."

Imposition of the tax was assailed in this Court upon two grounds: (1) violation of the contract clause; and (2) violation of the equal protection of the law clause in the Fourteenth Amendment. Substantially all of the Court's discussion of the case was under the first of these contentions. The language relied upon by the government in the present case was as follows: (218 U.S. pp. 403-404)

> "* * * The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the States to select and classify subjects of taxation, and, hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof."

The Court then stated that the taxpayer was contending that this holding did not dispose of the case because under the state law, rightly construed, the wife

owned a vested interest in the community property before the death of her husband and that she did not take as his heir. In answer to this contention the court asserted that it was concerned solely with the question of the power of the State to levy the tax upon the subject or thing taxed. It then added (p. 405):

> "To make this, if possible, clearer by an illustation we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that on an analysis of the constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffits, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that on the death of the husband the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, **because as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question not involving any violation of the Constitution of the United States, and which therefore we have no right to review."** (Emphasis ours.)

In effect, therefore, this Court held in the *Moffitt* case that the subject matter covered by the California statute was a legitimate object of state taxation; that as the Supreme Court of California had held that the wife's interest in the community passed to her as heir of the husband, it could be legitimately taxed. The Court further stated, by way of *obiter*, that its view upon this question would be the same even if it were to conclude, by an independent investigation of the law of California,

that the wife owned an interest in the community not properly includible in the husband's estate, since this point was purely a state question upon which the decision of the Supreme Court of California would be binding and conclusive.

In its discussion in the *Moffitt* case of the taxpayer's second contention (violation of the Fourteenth Amendment) the Court after noting that the argument was based upon the premise that the wife had a vested interest which could not be subjected to the tax, disposed of the contention by saying: "The nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review."

In effect, therefore, this Court did nothing more in the *Moffitt* case than to accept the decision of the Supreme Court of California as a final, binding adjudication as to the rights of the wife in community property in that state. That this is a correct interpretation of the opinion is evident from the opinion in *Coolidge v. Long*, 282 U.S. 582, 600, where this Court in referring to the case of *Moffitt v. Kelly* said:

> "The state court sustained the tax upon the wife's share in the community property. This court held that the nature and character of her right was a local question and that the tax was not violative of the contract clause of the Constitution or the due process or equal protection clause of the 14th Amendment."

The Court then points out that this "local question" had been considered and decided by this Court in *United States v. Robbins*, and there held to be one that had been settled as a rule of property in California by its highest court for more than sixty years.

Finally, in connection with the reliance of the Government on the excerpt first quoted from the *Moffitt* opinion, see the opinion of the Circuit Court of Appeals for the Ninth Circuit in *United States v. Goodyear,* 99 Fed. (2d) 523, cited *supra* p. 62.

Section 402 (b) Is Lacking in Geographic Uniformity

Not only does the statute, as amended by *Section* 402 (b) of the 1942 Act, violate due process, but it offends the Constitutional requirement that all excise taxes be uniform throughout the United States. (Article I, Sec. 8, Clause 1 of the Constitution). This uniformity provision refers to geographical and not to intrinsic uniformity. *State of Florida v. Mellon,* 273 U. S. 12; *Crooks v. Harrelson,* 282 U. S. 55; *Knowlton v. Moore,* 178 U. S. 41. It prohibits the "levying of duties imposed or excised upon a particular subject in one state, and a different duty imposed or excised on the same subject in another state," and it does require that **"whatever plan or method Congress adopts** for laying the tax in question, **the same plan or method must be made operative throughout the United States,"** and that **"wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."** *Knowlton v. Moore, supra.*

The 1942 Amendment does not make operative "the same plan" or "the same method * * * throughout the United States". It does not tax the same subject "everywhere throughout the United States".

The Federal Estate Tax Law is an excise on the privilege of passing property at death. *United States Trust Company v. Helvering,* 307 U. S. 57. *Landman v. Commissioner,* (CCA10) 123 Fed. (2d) 787. *Porter v. Commissioner,* 288 U. S. 436, 444. *Knowlton v. Moore,* 178 U. S. 41, 56.

By its general plan the tax is imposed "upon the transfer of the net estate of every decedent" (*Section* 810 *Internal Revenue Code*) and the property subject to the tax is limited "to the extent of the interest therein of the decedent at the time of his death." (*Section* 811 (a)). Thus, the plan is to impose a tax upon the "transfer" of property at death, measured by the value of the decedent's interest in such property.[26] The "subject" of the tax is this privilege of transfer by death. This was the subject of the tax in the community partnership property states until the passage of the amendment in question. This amendment, however, adopted a new plan and selected new subjects of taxation in the community partnership property states, leaving undisturbed the original plan and the original subjects of taxation in all other states.

The 1942 amendment, by its terms, is addressed only to community partnership property held "under the law" of the community partnership states. It has no op-

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[26]The only exceptions to the plan of limiting the tax to property beneficially owned at death by the decedent are: (1) transfers in contemplation of or intended to take effect in possession or enjoyment at or after death, including transfer where possession, use, enjoyment or income is reserved for the decedent's lifetime (Sec. 811 (c).)

(2) Transfers where the decedent reserved power to amend or revoke a gift Sec. 811 (d). (3) Transfers by decedent to his wife or a third party of an estate by the entirety or joint tenancy (Sec. 811 (c). In each case the *inter vivos* transfer is specifically includible only if the decedent *originally owned* the property and he made or caused the transfer to be *made donatively and without consideration.*

And, in each case, the *inter vivos* transfer must be donative or testamentary in character (e. g., transfers in contemplation or to take effect at death) or such as would not serve finally to vest the property in possession or enjoyment until the transferor's death (e. g., joint estates with survivorship, revocable trusts). In each instance a specific statutory provision was enacted to prevent tax avoidance. These serve to emphasize the basic character of the tax as an excise on the privilege of passing property at death.

In the *Estate of Rogers v. Helvering*, 320 U. S. 410,413 Mr. Justice Frankfurter, speaking for the majority of the Court, said, "For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed."

erative effect in other states. It is apparent from the analysis that we have given above (pp. 95 *et seq.*) that the plan or method laid down for community partnership states is not the same as the plan or method prescribed for the rest of the Union. It is likewise apparent from the express terms of the statute that the subject of the tax is different in these states from the subject of the tax in the other states of the Union.

(a) In all other states the general plan of taxation is to tax the transfer of the decedent's interest in the property, that is, his ownership thereof at death. In the community partnership property states, ownership of property is entirely disregarded, and the decedent is taxed with respect to property which he never owned and which he could not transfer at death.

(b) It is only in the community partnership property states that significance is given to the origin of the property. In the other states, the fact that a decedent created wealth . is not made the occasion for a tax if he did not own the property at his death.[27] But in the community partnership property states, the mere fact that the joint efforts of the spouses created the wealth is alone sufficient to tax the spouse first dying on the entire property, even though at such spouse's death he or she owned only half thereof.

(c) It is only in the community partnership property states that a presumption is adopted to the effect that a man and wife shall both be deemed at one and the same time to be the owner of all of the same property (i. e., that each is presumed to be the owner of the other's property), and that each is taxed on the other's proper-

[27]See preceding footnote.

ty, and the tax made to depend on the sheer accident of which spouse may happen to die first.

(d) It is only in the community partnership property states that a bare cessation of management over property administered for another is apparently made the occasion for the imposition of the tax. In the other states, the death of a partner, though he be the managing partner, does not result in the inclusion of his surviving partner's interest in his taxable estate. In the other states, the death of a trustee does not result in an estate tax on such trustee's estate measured by the beneficiary's property. But as to the community partnership property states, the statute provides that the managing partner of the connubial partnership may be taxed on the survivor's share, and the husband, as fiduciary, may be taxed at death on property merely managed by him for his wife.

(e) Not only is uniformity denied because property rights in the surviving spouse are subjected to the tax, while essentially identical rights in the surviving spouse in non-community property states go free; it is even more flagrantly denied in the respect that while denying reality to the wife's rights in those cases where conceding their substantiality would result in exemption, the statute concedes their substantiality where the concession results in additional taxation.

Thus, if the husband should die first, the full community partnership estate is, more often than not, made the measure of the tax, thereby disregarding entirely the wife's half interest in such property. But, where the wife dies first, at least her half interest, being the property of which she has the testamentary disposition, is subject to the tax. Thus the statute attaches consequence to ownership only when the concession results in increased taxa-

tion, but denies it in the converse case. In no other case, and in no other part of the Union, save in the community partnership property states, does the law concede or deny the existence of property rights solely for the reason that concession or denial enriches the Treasury in the particular case. In capriciously denying, or capriciously insisting upon the reality of the wife's interest according to the effect upon the revenue, the 1942 Act departs from the principle of uniformity, since the locale to which these discriminations are limited is the community partnership property states, and there are no comparable provisions applicable elsewhere.[28]

It is not contended that excises imposed by Congress must be of such a character that they actually produce revenue throughout the Union. The only requirement of the Constitution is that they must operate impartially wherever conditions are such as to bring them into effect. Thus, the rule of geographic uniformity does not prevent Congress from placing an excise tax upon tobacco, notwithstanding the fact that tobacco is grown in only a few states (*Edye v. Robertson*, 112 U. S. 580). But in the present case, it is not true that the subject matter of the tax is found only in certain states. On the contrary, it is true that there are comparable, even identical, legal relationships and situations elsewhere, which, because of the admitted and purposeful territorial limita-

[28]Consider the case of domiciliaries of Louisiana moving to a common law state, (See pages 51-52), *supra*. That state will recognize the common ownership of their property, although their property is no longer "community property". At death they will each be taxed on his or her half only, whereas, if they remained in Louisiana, the whole would have been taxed to the first to die. A different rule of taxation is prescribed, therefore, with respect to the same persons and the same property merely because of the locale.

Consider also the case of domiciliaries of common law states where spouses are permitted to make contracts establishing community ownership as set forth on page 53. The Dominion of Canada Succession Duty Act makes no similar discrimination against spouses holding property under the community laws of the Province of Quebec.

tions of the Act, are not subjected to the tax, thus making geographic uniformity impossible.

As the Supreme Court of Louisiana pointed out, there is no substantial difference between the wife's interest in the community partnership and the interest of an ordinary member of a limited or special partnership. As this Court observed in *Poe v. Seaborn*, *supra*, "powers of partners or trustees of a spendthrift trust furnish apt analogies." There may be some formal and technical differences, but the question here is: Are these differences of such weight or importance that consequences so radically divergent may be applied to their transfer at death?[29] Clearly they are not.

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[29]To make the point vivid, consider, for example, an actual case arising since the Act of 1942 where the wife died first and *all* of the community was included by the taxing officers as a part of her gross estate, and a deficiency demanded on that account from her executor. These spouses, soon after marriage, purchased on credit a tract of land. This land immediately became community partnership property. They farmed it, each actually doing physical labor in planting and harvesting crops. They prospered, paid for the land, bought other lands, and ultimately accumulated a substantial estate, without either ever having at any time any separate property, and without either having received anything whatsoever as compensation for "personal services"; but each having made a substantial contribution in direct labor to the acquisition of each community asset. When the wife died, all property was taxed as a part of her gross estate; when the husband dies, one-half of the same property will again be taxed as a part of his estate.

To determine the geographic uniformity of this tax, contrast this tax with the tax which would have been levied had these spouses resided in a non-community property state and had they taken title to the properties acquired as tenants in common, or as partners. In neither case would be the estate of the spouse first to die have been required to pay a tax measured by more than one-half of the jointly owned property. Yet it is clearly not true that there would be any greater enhancement in the managerial or proprietary rights of the surviving spouse in the other one-half of the jointly owned property in the community partnership property state than there would be in the non-community property state. In short, the lesser increase in purely managerial rights, if in fact there is any increase at all, is made the occasion for an increase in tax liability solely because the owner and property are located in community partnership property states; while corresponding or greater increases in managerial and proprietary rights when the owner and property are located in non-community property states *are not made the occasion for any increases in tax liability.*

It is also significant that since in the above case, there was no *gift* of the property by the husband or wife involved, even if the property in question had been acquired by the husband and wife as "tenants by the entirety" in a common law state only one-half of the property would be taxed at the death of either spouse.

No Court has been more firm than this Court in insisting that taxation is a practical matter. (*Helvering v. Horst*, 311 U. S. 112). We are admonished that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed, — the actual benefit for which the tax is paid" (*Corliss v. Bowers*, 281 U. S. 376, 378 (1930); *Estate of Hanford v. Commissioner*, 308 U. S. 39, 43 (1939). See also *Helvering v. Clifford*, 309 U. S. 331 (1940); *Harrison v. Schaffner*, 312 U. S. 579 (1941); *Griffiths v. Helvering*, 308 U. S. 355 (1939)). The subject of death duties, as of gifts, has "come to be identified more nearly with a change of economic benefits than with technicalities of title" (*Burnet v. Guggenheim*, 228 U. S. 280, 287 (1933)). Unless "technical distinctions" (*Chase National Bank v. United States*, 278 U. S. 327, 336 (1929)), and "attentuated subtleties" (*Lucas v. Earl*, 281 U. S. 111, 114, (1930) are to be again raised to a regard from which they have fallen, it must be concluded that the 1942 Act operates in non-community property states with results which are vastly different from those which are attendant upon it in community partnership states, and are discriminatory against the latter. To maintain this result is to place reliance upon "elusive and subtle casuistries" possessing "no relevance for tax purposes", which are presently — and rightly — in such ill repute (*Helvering v. Hallock*, 309 U. S. 106 (1940)).

The Committee reports state that, in adopting the 1942 amendment to the Estate Tax Law, the Congress was attempting to remove what it deemed to be an undue advantage enjoyed by residents of community partnership states. If it was the Congress' aim to place the community property states on an equality with the common law states, the statute in question is wide of the mark.

Far from equalizing the tax, Congress has seriously discriminated against the community property states as we have shown and has made the burden of estate taxes much heavier in those states than in other states.[30] In any event, with deference, we submit that the Committee seemed to be unaware of the real nature of the community partnership and substantially similar legal relationships in other state. An advantage for tax purposes presupposes that certain individuals or legal relationships are selected and given more favorable treatment than that accorded substantially identical relationships or individuals similarly situated. It is not discrimination to tax one more than another if one actually owns more than the other. Husbands and wives in the community partnership states whom the local law makes partners are not in the same situation with regard to property rights as husbands and wives generally in other states who are not partners. The fundamental and practical features of the community partnership law, previously enumerated in our summary, (pp. 13-18, *supra*) show clearly that the community partnership between husband and wife is in no sense a theory, but is in substance a partnership imposed by law which is unknown in the case of property rights of husbands and

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[30]For example, a man in New York accumulates during marriage a net estate of $1,000,000 and dies leaving a typical will whereby his wife receives the income from his estate for her life with remainder to his children. His estate tax is $325,700.00. At his wife's later death, her life estate terminates and no tax is payable when the property passes to the children. Contrast this with the Louisiana citizen who accumulates the same amount and dies leaving the same will. Under the 1942 Amendment he will pay the same tax at his death as the citizen of New York, but since his will passes only his half interest, his wife at her later death must pay an estate tax on her half which amounts to approximately $140,000.00. These two spouses in Louisiana pay together $465,000.00 or nearly 50% more that the New York spouses pay. Similarly, if in the same illustration, the wife of the New Yorker died first there would be no tax but her husband would pay $325,700.00 at his later death. If the Louisiana wife died she would pay $325,700 as against zero for the New York wife, and her husband must pay an additional $140,000.00 at his later death. Again they pay nearly 50% more than the New York couple.

wives in common law states. This partnership imposed by the Louisiana statutes creates burdens and limitations, as well as privileges, in relation to property rights of husbands and wives. The limitations upon the husband's property rights and the rights given to wives in community partnership states constitute practical disabilities and disadvantages which are unknown in common law states, so far as husbands and wives are concerned, and these practical burdens outweigh any "so-called" tax advantage. The same argument was made by the Government in support of the Commissioner's ruling in the income tax test cases, namely that to tax the husband on the wife's share of the community partnership income, would bring about uniformity and remove an advantage enjoyed by the community partnership states. This Court rejected this contention in *Poe vs. Seaborn, supra,* saying: (p. 117)

> "Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways. When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in states where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income."

The real test of discrimination is a comparison between how marital partners are taxed in community property partnership states and how special or limited partners are taxed in other states. When this test is applied, it clearly appears that the 1942 Amend-

ment did not remove, but actually created, discrimination based only on geographic location.[31]

In the last analysis, every complaint of discrimination and special privilege addressed to the recognition of community partnership property for tax purposes originates from the conception, wholly erroneous, that the systems of marital property rights prevailing in non-community property states are superior to community partnership systems, are more intrinsically just, are more in line with general conceptions of ownership and property rights. These critics take the view that the smaller number of States should conform their systems of marital property rights to the systems prevailing in the larger number of States. This does not have the merit of a national system. It involves no concessions from the States in the majority, but only a surrender of rights by the minority.[32]

Since the adoption of the Federal Constitution there has been a constant change in the marital property sys-

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[31] The so-called tax privileges which prior to the Amendment of 1942 were enjoyed by the husband and wife who had contracted a marital partnership in community partnership states are now enjoyed by and will continue to be enjoyed by all persons occupying the substantially analogous legal relationships in other States, because the 1942 Amendment is only applicable to the community partnership states. For example, husbands and wives in many common law states may by contract voluntarily form a partnership substantially similar to the community partnership. In most states, the husband, by donating half of his property to his wife, and obtaining an appointment from the wife as managing agent of her property, may bring about a legal relationship with regard to marital property similar to the community partnership. See note 16, *supra*.

A spendthrift trustee and the beneficiary or beneficiaries of such a trust is a common law legal relationship substantially similar to the community partnership relationship. The ordinary limited partnership with a managing partner is another example. See *Poe v. Seaborn*, *supra*.

[32] This view has the further vice of looking only at so-called benefits and disregarding burdens. See the rights of the wife in community property summarized at pp. 12 to 20, *supra*. As to comparative justness, we merely repeat the community property view—even though entirely non-commercial, the wife's activities merit as much economic reward as do the husband's commercial activities. She is entitled to her rights—these are not gratuities.

tems in force in most of the States. Perhaps all of the original thirteen states at an early date had the old common law concept of marital rights, the merging of the wife's identity with that of the husband and his acquisition upon marriage of all of the property which she then owned and all of the fruits of any activity in which she might thereafter engage. The necessary result of this system was to build up the estate of the husband. Everything was his, including his wife. Every departure from this ancient concept was in the direction of increasing the wife's property rights:—her right to continue to own the property which belonged to her at marriage; her right to profit individually by her own efforts and activities; and her right to manage her property and the fruits of her effort. Every such statutory change diminished the property of which the husband might die possessed; consequently, it diminished the tax which could be levied upon his estate. These statutory changes came at different times in different states. In common law or code states there have been, and there no doubt are today, substantial variations in marital property systems. If a man and wife are domiciled in South Carolina there may be a substantial difference in their rights to property acquired during the existence of the marriage from the rights of another man and wife acquiring property from similar sources while domiciled in Wisconsin. Is it discrimination or an unfair privilege, or estate tax advantage, to recognize those different marital property systems in determining the incidence of taxation? No one will so contend. Yet, there is or may be the same difference in marital rights and tax incidence in these cases as exists between the community partnership states and other states. If, for example, New York should decide to revert to the ancient common law doctrine, would it be discriminated against

because the Federal Government, having nothing to do with its decision so to revert to that system, gave effect thereto in determining the incidence of the Federal Estate Tax upon citizens of New York?[33] The same answer must be given to every assertion that citizens of community partnership states enjoy special privileges or tax advantages. Likewise, every failure to measure the tax by ownership results, not in removing an assumed advantage, but in gross discrimination and an unconstitutional lack of uniformity.

The short answer to all of the claims of special privilege is that neither Congress nor any other branch of the Federal Government has any power or right over the marital property systems in force in the various states, and, where these systems have a bearing upon the incidence of a federal tax, the extreme limit to which any branch of the Federal Government can or should go is to examine them as they are construed and applied by state courts to determine whether they are real and whether, tested by basic concepts of ownership, the one declared by state law to be the owner of property is actually such. When this determination is made, the incidence of the tax is controlled thereby and that this incidence may differ in the different states is no tax advantage.

Since the law of each state must determine questions of ownership, it is apparent that it is not possible to obtain identical practical results from the operation of the Federal revenue laws in each of the forty-eight states of the Union, unless Congress wishes to do violence

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[33] Differing rules as to the ownership of earnings of minor children furnish another example of difference in tax results which constitute no legal discrimination. Cf. the California law depriving parents of all, or part, of their children's earnings. (California Civil Code Sec. 361, 362.)

to the dual character of our Government and the historic and settled principle that the Federal Government must recognize marital rights and the ownership of property as defined and created by local state laws in the various states.

Congress has no power to legislate on domestic relations, proprietary interest in property or the origin of ownership, as these questions are exclusively within the powers of the States. *Ohio v. Agler*, 280 U.S. 379, 74 L. Ed. 489; *Smith v. Alabama*, 124 U.S. 465. To the extent that the 1942 statute undertakes to create property interests not recognized by state law, it violates these fundamental principles and strikes at the very root of our dual system of government. *McCullough v. Maryland*, 4 *Wheat.* 316-437, 4 L. Ed. 579, *Slaughter House Cases*, 16 Wall. 36-130.

It is, on the other hand, the peculiar and special province of the states to enact legislation which will make for stability of the family and encourage family life. In the exercise of this province, certain of the states, long before the adoption of any federal income or estate tax laws, have seen fit through community partnership laws, as Louisiana has always done since the first European set foot on her soil, to invest husbands and wives with a community or partnership of interest in the business and financial transactions of each other, as well as in their social and personal relationships. This constitutes a valuable advance in the recognition of women's rights and in social progress. It gives, particularly to the wife, a position of security and a just, direct and vested ownership in the financial gains resulting from the endeavors of her husband and herself. It invests the wife with the status of equality; and emancipates her from the limitations and status of inferiority to which she

was subjected under the ancient common law principles. It enables the wife to maintain her self respect as a human being with equality with her husband and thus eliminates the irritation which otherwise may arise between those essentially equal but occupying positions of dominance or subservience.

The community partnership property system ministers to the success of family life. It is only natural that a wife who has a vested community ownership in the earnings of her husband may be expected to take a greater interest and cooperate with more enthusiasm in the activities in which her husband may be engaged than will a wife who is by law made inferior and dependent upon her husband's generosity. Moreover, the wife whether she serves in the homes or in her husband's business, or both, is in fairness entitled to equal treatment and equal property rights. These are the concepts which underlie the community property system.

The policies of the various states which have adopted the community partnership system, involving the recognition of these progressive concepts and the attempt to establish a better plan of marital relations in their respective states, are justly deserving of encouragement and support. At least such states should not be thwarted or embarrassed in the adoption and administration of such policies by any legislation of the Federal Government, which will render less effective the community property partnership system, or deny to the members of the marital partnership the full benefits and enjoyment of the rights thus established.

It is of the utmost importance that federal legislation shall not entrench upon this critically important field of state action or impede the states in the pursuit of this evolution in social progress. The fundamental im-

portance of the family as the basic unit of the social structure of our nation has long been recognized and clearly established.

It certainly is not and should not be within the constitutional authority of the Federal Government to adopt or enforce legislation which will discourage or indirectly annul or invalidate in any manner whatsoever the legal effect of statutes of the states serving the purpose of social advancement in connection with a question of such vital domestic importance.

The Treasury Department, which sponsored the Estate Tax Amendment, seems to feel that uniformity is desirable. It is obvious that mathematical uniformity cannot be obtained by having Congress, in the form of a discriminatory legislative act, **disregard the fundamental laws of some states of the Union, and at the same time, recognize the local law of all of the other states of the Union as a guide and basis for the application of the Federal Estate Tax Law.** If the Government desires to tax the separately owned property and estates of both husband and wife as a whole and as a unit, it is not constitutional or fair to attempt to bring about this result by legislatives *fiat* in only a few selected states of the Union. If identical mathematical uniformity is sought to be accomplished, the Treasury Department should try to persuade Congress to attempt to tax the separate property and estates of husbands and wives as a unit in all the States of the Union. Insofar as husbands and wives are concerned, such a law would be uniform in its application in every state of the Union. This procedure, however, would only remove one of the objections to the present estate tax amendment, namely, that it arbitrarily and unfairly disregards the property rights of the community partnership property states and dis-

criminates against these States in calculating the Federal Estate Tax. If such a suggestion were adopted, and the Federal Estate Tax Law attempted to impose a Federal Estate Tax based on all of the property of both husband and wife in every state in the Union, regardless of which spouse died first, such a law would still be arbitrary and unfair as a gross discrimination against married people in favor of single people and would, of course, be an arbitrary, confiscatory and unconstitutional attempt to measure the tax of one person by the property of another. Until and unless the Federal Government is given and exercises power to regulate marital property and other local matters, any Federal Tax Act which does not recognize actual ownership, as fixed by state law, will be invalid.

Respectfully submitted,

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CHARLES E. DUNBAR, JR.

APPENDIX A

FEDERAL STATUTES

Revenue Act of 1942

"Sec. 401. **Estates to which Amendments Applicable.** Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act."

"Sec. 402. **Community Interests.**

(a) **Transfers of Community Property in Contemplation of Death, etc.**—Section 811 (d) (relating to revocable transfers) is amended by adding at the end thereof the following new paragraph:

'(5) Transfers of community property in contemplation of death, etc.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.'

"(b) General Rule—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out '(e) Joint Interests.—' and inserting in lieu thereof

'(e) Joint and Community Interests.—

'(1) Joint interests.—'.

(2) By inserting at the end thereof the following new paragraph:.

'(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.'"

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"Sec. 404. **Proceeds of Life Insurance.**

"(a) General Rule.—Section 811 (g) (relating to life insurance) is amended to read as follows:

'(g) Proceeds of Life Insurance.—

'(1) **Receivable by the executor.**—To the extent of the amount receivable by the executor as insurance under policies **upon the life of the decedent.**

'(2) **Receivable by other beneficiaries.**—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in con-

junction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

'(3) **Transfer not a gift.**—The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

'(4) **Community property.**—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community.'

"(b) **Liability of Life Insurance Beneficiaries.**—Section 826 (c) (relating to apportionment of liability of beneficiaries) is amended to read as follows:

'(c) **Liability of Life Insurance Beneficiaries. Unless the decedent directs otherwise in his will,** if any part of the gross estate **upon which tax has been paid** consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to **the sum** of the net estate **and the amount of the exemption allowed in computing the net estate, determined under section 935 (c).** If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.'

"(c) **Decedents to Which Amendments Applicable.**—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

"Sec. 407 **Deduction on Account of Property Previously Taxed.**

"(a) **Amendments to Internal Revenue Code Provisions Relating to Property Previously Taxed.**—

"(1) The first paragraph of section 812 (c) is amended to read as follows:

"(c) **Property Previously Taxed.**—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent; or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been ~~received by~~ the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. **Property includible in the gross estate of the prior decedent under section 811 (f) and property included in total gifts of the donor under section 1000 (c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor.** This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this **chapter** or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this **subsection, section 861 (a) (2), or the corresponding provisions of any prior Act of Congress,** in respect of the property or property given in exchange therefor.' "

"Sec. 411. **Liability of Certain Transferees.**

"(a) **Imposition of Liability.**—Section 827 (b) is amended to read as follows:

'(b) **Liability of Transferee, etc.**—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a *bona fide* purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in Section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a *bona fide* purchaser for an adequate and full consideration in money or money's worth.'

"(b) **Definition of Transferee.**—Section 900 (e) is amended to read as follows:

'(e) **Definition of 'Transferee.'**—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee, **and includes a person who, under section 827 (b),** is personally liable for any part of the tax."

"Sec. 451. **Gifts to Which Amendments Applicable.** Except as otherwise expressly provided,

the amendments made by this Part shall be applicable only with respect to gifts made in the calendar year 1943, and succeeding calendar years."

"Sec. 453. **Gifts of Community Property.** Section 1000 (relating to tax on gifts) is amended by inserting at the end thereof the following new subsection:

> '(d) **Community Property.**—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that ~~gifts of~~ such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.'"

Internal Revenue Code:

"Sec. 810. **Rate of Tax.** A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. * * *."

"Sec. 811. **Gross Estate.** The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States"—

"Sec. 811 (a) **Decedent's Interest.**—To the extent of the interest therein of the decedent at the time of his death;"

"Sec. 811 (e)

"(e) **Joint Interests.**—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: **Provided,** That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: **Provided further,** That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

"Sec. 812 **Net Estate.** For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate"—

"Sec. 812 (b)

"(b) **Expenses, Losses, Indebtedness, and Taxes.**—Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate,

"(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and

"(5) Reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered. * * * * * * . For the purposes of this section the term 'property subject to claims' means property includible in the gross estate of the decedent which, or the avails of which, would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate; and, for the purposes of this definition, the value of the property shall be reduced by the amount of the deduction under the next sentence attributable to such property. * * * * * *"

"Sec. 812 (c)

"(c) **Property Previously Taxed.** An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. * * *."

"Sec. 826 (b)

"(b) **Reimbursement Out of Estate.** If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

"Sec. 826 (c)

"(c) **Liability of Life Insurance Beneficiaries.** Unless the decedent directs otherwise in his will, if any part of the gross estate upon which tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

"Sec. 113. **Adjusted Basis for Determining Gain or Loss.**

"(a) **Basis (Unadjusted) of Property.** The

basis of property shall be the cost of such property; except that—

"(5) **Property Transmitted at Death.** If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *."

LOUISIANA REVISED CIVIL CODE, 1870

Art. 2405. Community presumed on dissolution of marriage. At the time of the dissoultion of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

Art. 2402. Property forming community – Personal injuries to wife. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." (As amended, Act 1902, No. 68.)

Art. 2403. Community and individual debts. - In the

same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

Art. 2406. - Dissolution of Marriage - Division of community. - The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

Art. 2409. – Debts contracted during marriage – Liability. – It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

Art. 2404. – Husband master of community – Gratuitous and fraudulent conveyances. — The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage.

A gratuitous title within the contemplation of the article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (As amended, Act. 1926, No. 96.)

Art. 2385. Wife failing to administer paraphernal property—Management by husband.—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

Art. 2386. Fruits of paraphernal property—Ownership.—When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues, which are existing at the dissolution of the marriage, belong to the owner of the things which produced them. (As amended, Acts 1871, No. 87. This article has been amended by Act 286 of 1944 but such amendment was adopted subsequent to the decedent's death in this case).

Art. 2399. Community of acquets and gains—Stipulation against required.—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2329. Alteration of agreement after marriage

prohibited—Couples removing into state—Contracts.—Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it can not be altered after the celebration. Provided that in the case of married couples removing to this State and settling therein from other States and countries after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State. (As amended, Act. 1910, No. 236.)

Art. 2332. Community of acquets or gains – Modification or abrogation by agreement – The partnership, or community of acquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

Art. 2425. Wife's right to petition for separation of property—The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. (See appendix B)

Art. 2430 — The wife, who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

Art. 2433 — The personal creditors of the wife cannot, without her consent, petition for a separation of property between her and her husband.

Nevertheless, in case of the failure or discomfiture of the husband, they may exercise the rights of their debtor to the amount of their credits.

Art. 496 — Ownership and possession distinguished — The ownership and the possession of a thing are entirely distinct.

The right of ownership exists independently of the exercise of it. * * *.

Art. 64 — The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife.

If on the contrary the husband or wife of the absentee chooses rather to have the community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards.

Art. 123 — The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains.

Art. 159 — The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

APPENDIX B

RIGHT OF THE WIFE TO A SEPARATION OF PROPERTY AND A DISSOLUTION OF THE COMMUNITY PARTNERSHIP

The Louisiana Supreme Court, as far back as 1844, in *Davock v. Darcy*, 6 Rob. 342, in interpreting Louisiana Civil Code Article 2425, held that the right of the wife to sue for a separation of property and a dissolution of the community partnership was not limited to the cases mentioned in Article 2425. The argument was made in the cited case "that a wife who had brought no dowry and has no rights and claims to exercise against her husband" could not obtain a separation of property within the meaning of Article 2425. The court rejected the contention as "giving to the Code too narrow a construction." In the *Davock* case the court was considering a set of facts in which the wife did not have **dowry or separate claims to assert or protect,** circumstances which it was contended were required by the language of the codal article as a condition for the bringing of the suit. The court nevertheless granted the decree of separation of property and a dissolution of the community partnership in order to protect the wife's earnings which, unless a separation of property was granted, would have fallen into the community partnership and would have been jeopardized by the insolvency of the community partnership and the disorder of the husband's affairs. The

rule of the *Davock* case, which reads out of the Code the apparent requirement that the wife have dowry or separate claims against her husband as a condition to the right to claim a separation of property and a dissolution of the community partnership, has been consistently applied and followed by all of the subsequent cases in which the point has been presented to the Supreme Court of Louisiana. *Wolfe & Clark v. Lowry*, 10 La. Ann. 272; *Mock v. Kennedy*, 11 La. Ann. 525; *Webb v. Bell*, 24 La. Ann. 75; *Vickers v. Block*, 31 La. Ann. 672; *Gastauer v. Gastauer*, 131 La. 1; *Carite v. Trotot*, 105 U.S. 75; *Jones v. Jones*, 119 La. 677; *Larose v. Naquin*, 150 La. 353 at 358; *Holmes v. Barbin*, 15 La. Ann 553 (1860).[1] As far back as 1855, in *Wolfe & Clark v. Lowry*, 10 La. Ann. 272, after referring to the long line of decisions restating the rule in the *Davock* case that the right of the wife to a separation of property and a disoslution of the community partnership was not limited to the cases mentioned in Article 2425 of the Civil Code, the Supreme Court of Louisiana said: "After these repeated decisions, we must consider the law as settled, the question being one of the construction of statutory law, involving no fundamental principles."

The Louisiana Supreme Court later held, in *Webb v. Bell*, 24 La. Ann. 75 (1872), that even though the wife was not engaged in any lucrative undertaking and there was no existing interest in the community partnership to protect at the time of the suit, the wife would nevertheless be given a judgment of separation because of the possibility of her having future earnings or of her acquiring property in the future which would fall into the community partnership and which should be protected.

[1]The holdings of the Louisiana Supreme Court are in exact accord with the French doctrine, under an article identical with the article of the Louisiana Code.

In *Chaffe & Sons v. Watts*, 27 La. Ann. 324, decided in 1885 the Supreme Court of Louisiana said:

> "One of the most beneficent objects of the laws authorizing separation of property is to emancipate not only the property, but also the industry, of the wife from control of an insolvent husband and to enable her to earn a livelihood for herself and family free from his debts and embarrassment."

The court, in referring to "one of the beneficent objects" of a separation of property and a dissolution of the community partnership, was describing a case where the husband was insolvent and his affairs were in disorder. The reason for the rule and the principle stated, however, would have had equal application if the husband had been a "bad manager" and the wife's one-half ownership in the community partnership was thereby endangered. The rule established by the court would logically have equally supported a statement that "one of the most beneficent objects of the law authorizing a separation of property and dissolution of the community partnership is to protect the wife's present and future property interests from the danger and damage of the husband's mismanagement and fraud."

In the earlier cases the action was usually brought when, because of the husband's bad management, the husband's affairs were in disorder and the community partnership debts exceeded the community property assets and when there was, in fact, no residual half interest of the wife in the community partnership to protect. The dissolution of the community partnership was decreed in these cases to protect the wife in the event that she should have future earnings or acquired property in the future that would fall into the community partnership.

These cases certainly do not justify an inference, as the Solicitor General suggests, that a different result would have been reached if the community partnership had been solvent. As a matter of fact, if the possibility of the wife's having future earnings, which would become community partnership property and be subject to the husband's mismanagement, and if the protection of this property from the husband's mismanagement or from the insolvency of the community partnership, would justify a separation and a dissolution of the community partnership, then *a fortiori*, a wife would be entitled to a separation of property and to a dissolution of the community partnership if the community partnership was not yet insolvent and if the wife's interest in one-half of the community property assets was being jeopardized and needed protection. This construction is in line with the meaning and philosophy of the Louisiana jurisprudence on the subject and when this rule was again clearly stated in the *Wiener* case no enlarged construction of the earlier cases was involved.

As a matter of fact, the Louisiana Supreme Court in *Gastauer v. Gastauer*, 131 La. 1, following the *Davock* case, clearly indicated that a separation of property and a dissolution of the community would be decreed when the community partnership property was involved. In that case there was an allegation that the action for separation of property was for the purpose of protecting the wife's separate property. The court found, however, that the property in question was not separate property but community partnership property. But the court nevertheless held that the wife was entitled to a separation of property, evidently for the purpose of protecting both her existing one-half interest in the community partnership and her future earnings or acquisitions.

The Louisiana decisions make clear that the wife is entitled to a separation of property and to a dissolution of the community partnership, if her property interests are endangered or jeopardized, regardless of whether the property interests consist of her dowry and separate claims or her existing one-half interest in the community partnership property or her future earnings or acquisitions.

Now, the danger and damage to any or all of the wife's property interests against which the wife is protected by the judgment of separation of property and a dissolution of the community partnership, is the danger and damage resulting from either (a) **"mismanagement or otherwise"** or (b) **"the disorder of his affairs"**. Louisiana Civil Code Article 2425 expressly describes these two grounds for a separation of property and separates the description of these two grounds with the disjunction "or." It is clear, therefore, that if either ground is alleged and proved, the wife, according to the express language of Article 2425, is entitled to a judgment of separation of property and to a disoslution and liquidation of the community partnership. Article 2425 provides that the wife may, during the marriage, petition for a separation of property on two grounds, one of which, according to the language of the article, is "owing to the mismanagement of her husband, or otherwise * * *". These words "mismanagement or otherwise" as defined in and developed by the Louisiana jurisprudence interpreting the article have been given a well defined meaning.

Since Louisiana Civil Code Article 2404 expressly prohibits the husband from disposing of the community partnership property in fraud of his wife's rights, and since a fraudulent disposition of property by an

agent or manager constitutes the grossest kind of mismanagement, then, *a fortiori* the handling or disposing of the community partnership property in fraud of the wife's rights is "mismanagement" as defined by the Code: It certainly is not a strange or enlarged construction of Article 2425, read in the light of Article 2404 and the prior jurisprudence of Louisiana, for the Supreme Court of Louisiana to say that fraudulent management is "mismanagement," and if proved will justify a separation of property and a dissolution of the community partnership. Other cases cited elsewhere in this brief make clear that the husband must account for and reimburse the wife for her one-half of any community partnership assets handled or disposed of in fraud of her property rights as a partner.

The Supreme Court of Louisiana in *Larose v. Naquin*, 150 La. 353 (1921) approved the statement in *Jones v. Jones*, 119 La. 677 (1907), that the wife might invoke the remedy of a separation of property upon proof that the husband was of a *speculative disposition* and was daily incurring debts. It is also significant that the court in the *Larose* case, referring to the *Jones* case, said:

> "The wife in that case had based her suit for separation upon two grounds, either of which would have been sufficient if supported by proper evidence: (1) That her husband was of a speculative disposition, and was daily incurring heavy indebtedness in buildings and improvements and extensive planting, which she feared might prove disastrous and thereby endanger any future acquisitions of hers; and (2) that she was his creditor for paraphernal funds received by her, * * *." (Emphasis ours)

It is clear that the Louisiana supreme court an-

nounced in the above case that the wife was entitled to a separation of property and to a dissolution of the community partnership if the husband as manager of the community partnership was of a "speculative disposition and was daily incurring debts." The court was thus defining a form of mismanagement and interpreting the words "Mismanagement or otherwise" in the Code. If the court did not consider the husband as an agent or fiduciary it would not have stated, in substance, as far back as 1921, that a husband having a "speculative disposition" was a bad manager of the community partnership. If the facts as to mismanagement or fraud are alleged and proved and if the community partnership is not already insolvent and there is a liquidating interest available to the wife, the action for separation of property is given to the wife both for the protection of her undivided half interest remaining in the community partnership and for the protection of her future earnings or acquisitions. There is nothing difficult or strange in this construction of the wife's rights and the limitations on the husband as agent or manager, in the light of the purpose and philosophy of the rule announced in the prior decisions of the Louisiana Supreme Court.

In defining and appraising the meaning of both negligent and fraudulent mismanagement, the Louisiana Supreme Court necessarily and properly interpreted the words "mismanagement" and "fraud," as used in our codal articles, as they are ordinarily described and applied to the obligations and duties of agents, managing partners and other fiduciaries in common law states. The Louisiana Supreme Court in the *Wiener* case did not enlarge, but merely summarized and restated, the principles and philosophy of the Louisiana codal articles and the rules established by the jurisprudence of the state, when it said:

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"It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. * * * The community partnership had to be placed in charge of a managing partner for very expeditious and necessary reasons — dealings with third parties with respect to the community property had to be protected from the nullifying actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its affects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

"But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife's right to assert such limitations. * * * The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community partnership whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized. * * *"

APPENDIX C

LEGISLATIVE AND JUDICIAL HISTORY OF THE COMMUNITY PROPERTY CONTROVERSY

Following an earlier opinion applicable only to Texas rendered in 1920, the Attorney General of the United States, on February 26, 1921, rendered an opinion which was promulgated by the Commissioner of Internal Revenue as Treasury Decision 3138 on March 3, 1921, based on an exhaustive study of the laws of all the community property states. In these opinions, the Treasury Department announced that in Louisiana, Texas, Arizona, New Mexico, Idaho, Nevada and Washington, all of which are community property states, the wife, as a partner in community, was the vested and real owner of one-half of all of the community property including the income derived from such property, and that since all community partnership income belonged equally to husband and wife, one-half of such income should be returned separately for income tax purposes by each spouse. (California was excepted from the ruling in 1921. Subsequent changes in the community property law of California have resulted in the Government recognizing the same right of husbands and wives in California since 1930).

In 1921, 1924, 1934, 1940 and 1942, attempts were made in Congress to amend the Revenue Act, which amendments were designed to compel the husband in community partnership states to include in his individual income tax return the half of the community income which belonged to his wife under the local state law. In 1921 and again in 1924, 1934 and 1940 oral arguments were made before the Committee on Ways and Means and briefs were filed with the Committee in behalf of the community partnership states in 1921, 1924 and 1934, showing

that the proposed amendments were grossly discriminatory and unjust, and, as a result, the amendments were rejected by Congress. (Vol. 61, Congressional Record, No. 146, for November 3, 1921, pp. 8037, 8038; Report of hearings, before Committee on Ways and Means, House Reports, Revenue Division, 1924, pp. 194, 348, 375 to 482, inclusive). Similar amendments were twice defeated on the floor of the Senate after an exhaustive debate.

When the sponsors of the legislation in 1921 and again in 1924 failed to persuade Congress to ignore the laws of the community partnership states and to compel by legislative fiat the husband to pay taxes on his wife's half of the community partnership income, efforts were then made to change the rulings of the Treasury Department and of the Attorney General which had been in effect for many years. Following the decision of the Supreme Court in *U. S. vs. Robbins*, 269 U. S. 315, dealing with the law of California, the Treasury Department finally decided to institute test suits in some of the other community partnership states, so that this Court might decide the matter. In 1930 this Court unanimously decided that the prior rulings of the Attorney General and Treasury Department were correct and accordingly, that in the States of Louisiana, Washington, Texas and Arizona the wife had a legal and real ownership in half of the community partnership property and the *partnership* income arising therefrom and the right of husbands and wives in those states to make separate returns of the community income was again authoritatively recognized. (*Poe vs. Seaborn* (Wash.) 75 Law Ed. 239-247, 282 U. S. 101-118; *Fred O. Goodell vs. I. B. Koch* (Ariz.) 75 Law Ed. 247, 282 U. S. 118-122; *Jacob O. Bender vs. Wm. Pfaff* (La.), 75 Law Ed. 252, 282 U. S. 127-132; *Geo. C. Hopkins vs. G. W. Bacon*

(Texas), 75 Law Ed. 249,282 U. S. 122-127; *United States v. Malcolm* (Cal), 75 Law Ed. 714, 282 U. S. 792; see also *Warburton v. White*, 176 U. S. 484; *Arnett vs. Reade*, 220 U. S. 311). The Treasury Department accepted these decisions as applicable to the remaining community property states of New Mexico, Idaho and Nevada without the necessity of further test cases.

After the Treasury Department had repeatedly failed to persuade Congress to adopt an amendment to the Revenue Law in 1921, 1924 and again in 1934, amounting in substance to a mandatory joint returns provision applicable only to the eight community partnership states, which were rejected by Congress after public hearings because it ignored local property laws and would have grossly discriminated against the eight community partnership states, the Treasury Department then proposed in 1940 and 1942 a universal "mandatory joint" returns amendment requiring husbands and wives to include all of their separate income (including their partnership income) in a single return, which would have been applicable to husbands and wives in all states. Although this "universal mandatory joint returns proposal" of the Treasury Department would have been uniform in its application to husbands and wives in all states, and would have disregarded the local property laws governing ownership of property in all states, it at least did not discriminate against husbands and wives in the community property states as distinguished from husbands and wives in all the other states.

In open hearings before the Ways and Means Committee in 1942 the proposed universal joint returns amendment was bitterly attacked by representatives of National Women's Organizations as being reactionary and a violation of the independent and separate property

rights of women and was also opposed by taxpayers of the common law states as disregarding local property rights and as constituting a discrimination against married people in favor of single people for tax purposes. The Ways and Means Committee therefore rejected the universal mandatory joint returns proposal of the Treasury Department. A substitute proposal (the same as that which had been repeatedly rejected in prior years) to adopt a mandatory joint returns proposal applicable only to the eight community partnership states, was also rejected by the Committee. (Revenue Revision of 1942, hearings before the Committee on Ways and Means, House of Representatives, 77th Congress, 2nd Session, March 25, 26, 27, 30, 31 — April 1, 2, 3, 7, 8 and 9, 1942, Volume 2.)

Several months after the completion of the public hearings in 1942 and the rejection of the two proposed income tax amendments as unfair and discriminatory, the Committee, during the last few days of its meetings, on the recommendation of the Treasury Department in **executive session** adopted the Community Property Estate Tax Amendments of 1942 which are challenged in the present case. No public hearings were held and no opportunity was given to representatives of the Taxpayers of community property states to oppose and contest the proposed amendments. The provisions and effect of the Estate Tax Amendment are inconsistent with the previous action of the Ways and Means Committee taken in connection with the two proposed income tax amendments and are also inconsistent with the arguments advanced by the Treasury Department in the open hearings in behalf of the community partnership income tax amendment which had been rejected by the Committee several months before.

The legislative history of the last minute adoption of the 1942 Estate Tax Amendments indicates very clearly that they were hastily adopted on the recommendation of the Treasury Department, apparently without any study or careful consideration by the Committee and without Congress having the benefit of a public hearing and discussion by the representatives of the taxpayers of the states involved. The last minute action in executive session by the Committee in adopting the 1942 Community Estate Tax Amendment (Section 402 (b) (2)) is completely inconsistent with the Committee's action taken some months previous in rejecting the community partnership income tax amendment after exhaustive hearings.

IN THE

Supreme Court of the United States

October Term, 1945

No. 58

JOACHIM O. FERNANDEZ, United States Collector of Internal Revenue,

Appellant,

v.

SAMUEL G. WIENER; WILLIAM B. WIENER and JACQUES L. WIENER,

Appellees.

No. 59

THE UNITED STATES OF AMERICA,

Appellant,

v.

HENRY ROMPEL, JR., as Administrator de Bonis Non Cum Testamento Annexo of Ernst Herbst, Deceased,

Appellee.

On Appeal in No. 58 From the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

On Appeal in No. 59 From the District Court of the United States for the Western District of Texas, San Antonio Division.

BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, ARIZONA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS AND WASHINGTON, AS AMICI CURIAE.

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BRIEF OF ATTORNEYS GENERAL OF CALIFORNIA, ARIZONA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS AND WASHINGTON, AS AMICI CURIAE.

The Attorneys General of the States of California, Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas

and Washington, pursuant to leave of Court, file this brief as *amici curiae* in support of the decisions here under review.[1] In so doing they are acting on behalf of the people of their respective communities, to whose interests and social polity the present causes are of vital, and extraordinary, concern.

The Question Presented

Omitting formal matters sufficiently covered in other briefs on file, we come at once to the problem of the validity of the 1942 amendment to Section 811(e) of the Internal Revenue Code (56 Stat. 941), by which there is included within a decedent's taxable estate, property

> "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Carrying forward the same concept, the 1942 Act added corresponding provisions relative to life insurance purchased with community funds (Section 811(g)(4), I.R.C., 56 Stat. 941); and to "gifts of property held as community" (Section 1000(d), I.R.C., 56 Stat. 952).

The position of the people of the community property states is briefly indicated by the following

[1] *Rompel v. United States*, 59 F. Supp. 483; *Wiener v. Fernandez*, 60 F. Supp. 169.

Summary of Argument.

I. Congress, in ascribing a fictional status to the wife's interest in community property, has given legislative sanction to an unrealistic and unhistorical view of the community property system. (See pages 4 to 17.)

II. The 1942 Act deprives married women residing in the community property states of property without due process of law, by including their property, namely, their community interest, with the property of their husbands for the purpose of levying death duties against the estates of the latter. As to such property, there is no transfer from the husband to the wife, nor any accession to the wife's rights and interests by reason of the husband's death, sufficient to constitute a taxable event. (See pages 18 to 31.)

III. The 1942 Act does not operate with geographical uniformity. In community states, it taxes at the husband's death the transfer of property as to which the wife stands substantially in the relationship of a co-owner or partner with her husband, imposing no tax on the transfer of property held under comparable relationships in non-community states. In the community property states, this results in unjustly augmenting husbands' estates, and in thereby increasing the rates applicable to property rightfully included. (See pages 31 to 36.)

IV. Community property, an incident of the marital relation, originates in and is regulated by state law. The nature and quantum of the spouses' interests, determinable by that law only, cannot be ignored by Congress for the purpose of levying taxes. Rights created and protected by state law are set at naught if Congress is permitted to go back to the assumed "source" of marital property, to give or take away according to its own con-

cepts of economic origin. Such legislation is an invasion of the powers reserved to the states or to the people. (See pages 37 to 46.)

V. The community property system, dealing with a subject matter peculiarly of local concern, represents an expression of state policy, social and economic. This fact gives special emphasis and urgency to the contention of the communiy property states based upon the Tenth Amendment. Determinable by no rule of thumb, the problem presented involves considerations having to do with social advantage or disadvantage, with the enhancement or deterioration of the human values of the communities concerned.[2] We have considered it appropriate therefore to point out certain respects in which the Court's decision may aid or impede progress toward desirable social objectives. (See pages 46 to 74.)

I.
The Congressional Concept of Community Property.

We submit that in enacting the 1942 amendments Congress was acting under a fundamental misconception as to the nature of, and the respective rights of spouses in, community property—a misconception reflected in the reports of the Congressional committees which framed and sponsored this legislation.

The Report of the House Ways and Means Committee on the 1942 Act says (in part):[3]

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[2]See quotations from Justices Holmes and Frankfurter, pages 47 and 70, *infra*.

[3]On legislative history as an aid to construction, see *Harrison v. Northern Trust Co.*, 317 U.S. 576, 87 L. ed. 407 (1943); *Riggs v. Del Drago*, 317 U.S. 95, 98, 99, 87 L. ed. 106 (1942); *Helvering v. Griffith*, 318 U.S. 371, 378, *et seq.*, 87 L. ed. 843 (1943).

> "For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in noncommunity-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In noncommunity-property States, all such property is regarded as belonging entirely to the husband." (1942-2 C.B. 401.)

After illustrating the results of this alleged "preferential treatment," the Report continues (1942-2 C.B. 402):

> "Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. * * *"

The Report of the Senate Finance Committee (1942-2 C.B. 674) says the amendments "make due provision for the exclusion from the gross estate of that portion of the community property which is *economically attributable* to the survivor." (Emphasis supplied.)

The House Committee states that in community property states, property acquired by the husband's efforts after marriage "is treated *as if* one-half belonged to the wife." The *as if* assumes that the wife's ownership is a fiction. The Senate Report, more considerate in form, carries the same implication. To whom, says the Senate, is the property "economically attributable"? The state law, through whose grace and under whose protection the property was acquired, deems it attributable to *both*

spouses. But the Senate Committee attributes the property to one spouse, presumably the husband.[4]

The Acting Secretary of the Treasury in a letter to the Senate (Sen. Doc. 69, 78th Cong., 1st Session, June 23, 1942), refers to the community property system as a "loophole for taxation." A distinguished lawyer, formerly General Counsel of the Treasury, speaks of it as an "alien intruder" (Paul, *Federal Estate and Gift Taxation*, Section 1.09). The writer of an annotation to *Rompel v. United States*, 59 F. Supp. 483, in 58 Harvard Law Review 742, says, "* * * in substance the wife's interest in property held in a community property regime differs little from her interest in her husband's property at common law." This assumption, if correct, would require or at least justify, putting the wife's interest on the same basis as dower, or any other merely "expectant" interest.[5]

Views such as these, widely diffused, have had their influence on Congress. Although, as we believe, fundamentally erroneous, they have gained such acceptance as presently to imperil the domestic economy of the community property states. Of the grave constitutional prob-

[4]The Treasury, a non-legislative agency, but one which is influential in these matters, holds community property in even less esteem than does Congress, regarding not merely the wife's ownership, but the entire community system as a fiction. In Section 472.405 of Treasury Decision 5279, 1943 C.B. 952, 970 (July 10, 1943), the Treasury, referring to the postponement of certain acts where a member of the armed forces is concerned, speaks of a case where "the spouse and member are domiciled in a *so-called* community property state." (Emphasis ours.)

[5]The Government, admitting there are "technical differences" between the two kinds of interests, contends that they "afford no ground for distinctions upon the constitutional level" (App. Br., *Wiener* case, page 41, also page 6). We hope to show that the differences are more than "technical" — whatever that convenient term, here used in a denigratory sense, may include.

lems to which the 1942 legislation gives rise, one has to do with the power of Congress to ignore property rights recognized and enforced by state law. This will be discussed later. At the moment, we are concerned with an assumption underlying the attitude of Congress, explaining to some extent, we believe, the expression of its will, namely, that to endow the wife with part ownership of property acquired through the sharing of burdens and sacrifices is to give substance to a fiction; that the very concept of equal ownership is alien, having no place in American institutions.

We shall undertake to show that systems of community property are ancient and widespread; and that the contrary concept, that the wife's interest in community property is a delusion, hardly more than a pretense, is based upon a misconception of the nature of community property, its history, and the social policy which it exemplifies.

Origin of the Community Property System in America.

The community property system was old at the birth of the American Congress, which a century and a half later was to deny that the system had any substantial reality. Without disputing claims to a more ancient lineage, suffice it to say that the origins of the system can be traced at least as far back as the early Christian era.[6] It is the true heritage of the Anglo-Saxon peoples, lost to them through historical accident, as we shall show in another place (see page 62, *infra*).

[6]Some resemblances to, perhaps the beginnings of a community property system, are found in very ancient times. See Lobingier, The History of the Conjugal Partnership, 63 Am. L.R. 250 (1929); Howe, The Community of Acquests and Gains, 12 Yale L.J. 216 (1903); de Funiak, Principles of Community Property, Section 7.

Germany. The Teutonic tribes recognized a form of marital community ownership as early as the period of the folk laws, or *leges barbarorum,* which antedated the Frankish period, beginning about 500 A.D. (See quotations from Huebner, *A History of Germanic Private Law,* Appendix, pages 1 to 5.) During the period of the Frankish Empire (about 500 to 843), the community principle was further developed into what Huebner terms (Appendix, page 1), "a true legal community as respects so-called *acquests* '(Errungenschaften'),—that is, such property as was acquired by the spouses during marriage, by labor or by juristic act, for value." That the community system continued in full vigor through mediaeval and modern times—except perhaps the most recent, when German civilization, formerly respected and renowned, has gone into eclipse—is shown by the excerpts from Huebner, quoted Appendix, pages 3 to 5.

France. The origins of the community system in France are uncertain, but that a form of community existed there in the mediaeval period is clear. Beaumanoir, *célèbre légiste* of the latter half of the 13th Century (1246-1296), is quoted in Brissaud, *A History of French Private Law,* page 816 (see Appendix, p. 8), as follows. "Everyone knows that a community is formed by marriage, for as soon as the marriage is performed the property of one and the other becomes common by virtue of the marriage. My views are that the man is a guardian . . ."[7]

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[7]Referring to the same period, the French scholar Gaëtan Aubéry says: "The marital authority has then for foundation, in the time of Beaumanoir, the desire to introduce concord and stability to the fireside by establishing a single control. The wife is not at all an inferior, but an associate who is subordinate to the husband only in that he is head of the firm." (Aubéry, *La Communauté de Biens Conjugale* (Paris, 1911), page 180; our translation; for the original, see Appendix, page 9.)

Without prolonging the discussion, we respectfully refer the Court to various excerpts from Brissaud, quoted Appendix, pages 5 to 9. Normandy, dominated by "nobles," refused to accept the community system (Brissaud, page 790). We shall later (see page 58, *infra*) explain the reasons for this, and how it came to pass that the people of England and the United States were deprived of this heritage of their ancestors. Normandy aside, the community system spread from the countries or regions of the *Coutumes* to the whole of France.

As further showing how ancient and widespread was the community concept in France, we quote in the Appendix, page 15, excerpts from de Ferriere, *Nouveau Commentaire Sur La Coutume de Paris* (Paris, 1770), from which it appears that a highly developed system of community property was in effect under the renowned civilization of the French capital, long prior to the American Revolution. It is not without relevance to the instant cases to observe that in England, at the same time (see Blackstone, Appendix p. 18; also Note 10, *infra*), the wife's existence was "suspended," or "entirely merged or incorporated" in that of the husband, who, to "acquire" property in absolute ownership had only to marry its owner; at a time, moreover, when the husband not only appropriated the wife's goods, but could give her "moderate correction" (Appendix p. 18); a privilege which, he says, the "lower rank" of people, "always fond of the old common law,"—singular people, indeed—still claimed and exerted. After enumerating various indignities and outrages to which women were subject at common law, the humorous Blackstone concludes: "so great a favourite is the female sex of the laws of England." (See Appendix p. 19.)

A passage from Molière (1622-1673), written more than one hundred years before the American Revolution, shows how familiar the community idea was at that time even to a popular audience in Paris. A "notary" is speaking:

> "Don't I know that being joined, people are, by custom,
>
> Common in movables, in immovables and goods acquired,
>
> Unless by a writing expressly renounced?" (L'Ecole des Femmes, Act IV, scene 2; our translation; for the original, see Appendix p. 10.)

Spain. The Visigoths, who invaded Spain about 412 A.D., brought with them a community property system whose outlines have been preserved in the *Forum Judicium*, commonly known as the Visigothic Code, compiled about the middle of the 7th Century (see Scott, *The Visigothic Code,* Boston, 1910, preface, page 24; also Schmidt, *Historical Outline,* page 28, referred to Note 8, below), the Spanish text being known as *Fuero Juzgo.* According to Book 4, Title 2, Law 17, of this compilation (Law 16 of Scott's translation of the Latin version; see Scott, *The Visigothic Code,* page 126), husband and wife shared originally in the community according to a proportion fixed by their respective contributions. Their shares later, but prior to the middle of the 13th century, became equal (*Fuero Real,* Book 3, Title 3, Law 1, *Los Codigos Españoles,* page 378 (Madrid, 1847),[8] and

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[8]The *Fuero Real,* promulgated in 1255, was a precursor of the compilation known as *Las Siete Partidas* (translated by Scott under that title, Chicago, 1931), first published in 1263. See Schmidt, *Historical Outline of the Laws of Spain,* page 67, the latter work being an introduction to *The Civil Law of Spain and Mexico* (New Orleans, 1851), by the same author.

this system, persisting to modern times (*Novisima Recopilacion,* Book 10, Title 4, Law 1 (Madrid, 1805)), was carried into the Spanish Civil Code (Art. 1392 *et seq.;* see *Codigo Civil* (Barcelona, 1934); Felipe Sanchez Roman, *Derecho Civil,* Volume 5, page 826 (Madrid, 1912)).

England. In England, the community idea made no headway against the common law concept, early developed, that husband and wife are one and that one the husband;[9] or as Brissaud puts it, "the feme covert * * * was absorbed in and annihilated by her husband" (*op. cit.* p. 29; Appendix p. 6).[10] "The community was more frequent originally among the commoners" (Brissaud p. 821; Appendix p. 8). "The social anatomy of this law" (that of the nobility) is "more archaic than that of the plebeians" (Brissaud p. 822; Appendix p. 8).

These observations of the French legal historian are confirmed by eminent English authority. The distinguished scholars Pollock and Maitland say:

> "We are told that in France the system of community first became definite in the lower strata of society; there was community of goods between the *roturier* [commoner] and his wife while as yet there was none among the gentry. We have often had occasion to remark that here in England the law for the great becomes the law for all. * * * In

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[9]Holmes, J., dissenting in *Hoeper v. Tax Commission,* 284 U.S. 206, 219, 76 L. ed. 248 (1931).

[10]Blackstone confirms this, also stating that "a sixth method of acquiring property in goods and chattels is by *marriage.*" See in the Appendix, page 18, quotation from Blackstone's Commentaries, page 433, Book II (Cooley's 2nd ed., Chicago, 1872).

See also Holdsworth, A History of English Law (6th ed., Rev.), Volume 3, page 526, on the point that there were no limitations on the husband's rights over the wife's chattels, and that the latter became absolutely the property of her husband.

England, with its centralized justice, the habits of the great folk are more important than the habits of the small. This has been so even in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property, and this was first evolved among the rich by means of marriage settlements." (Pollock and Maitland, *History of English Law,* 2d Ed., Vol. 2, page 402. See also Appendix p. 19.)

Holdsworth, in Volume 3, page 524, *op. cit.* Note 10, *supra,* says:

"In the course of the thirteenth century the law took a turn which resulted in the rejection of any theory of community. This was due to two causes. (1) We have seen that the royal courts, and therefore the common law, surrendered to the ecclesiastical courts all jurisdiction over testamentary and intestate succession to chattels. This meant that the common law lost sight of the wife's right to chattels on the death of her husband. It looked only at the state of things which existed while the marriage lasted; and, during this period, both in countries which recognized community and in countries which did not, its chief feature was the absolute control of the husband. Thus the common law naturally tended to magnify the control of the husband to such a degree that it literally gave him the chattels of the wife, and denied the wife any capacity to own them. * * * (2) As we have seen, the common law made the law of the nobles the law for all." (The author then quotes from Brissaud to the effect that "community is the law of the merchants," etc., see page 55, *infra.*)

In a learned monograph, "Married Women's Property in Anglo-Saxon and Anglo-Norman Law," 4 Annals of American Academy of Political and Social Science 233

(1893), by Florence G. Buckstaff, it is stated (page 261):

"I have already said that the system of married women's property set forth by Glanvill [lawyer and justiciar of latter part of Henry II's reign, 1154-1189] continued in force in England until the present generation.

"On the continent the feudal disabilities were gradually mitigated, and the doctrine that husband and wife were one person soon became obsolete. The reason for the duration of these disabilities in England is bound up with the whole history of the English people, which preserved an anomalous feudal family law by the side of great and growing constitutional and political liberties. Laboulaye's description of the aristocratic system in France may perhaps be held to apply in England. The growth of the aristocracy, he says, and the idea of families as units, increased the tendency to ignore women and younger sons. 'To maintain the nobility existing, to enrich it with new fortunes, to raise the bourgeoisie to nobility was the constant aim of jurisconsults and legislators.' In the fifteenth and sixteenth centuries primogeniture and the exclusion of women were looked upon very favorably. 'Quia da familiarum conservationem praesertim ordinantur et diriguntur.' * * * Sir Frederick Pollock also says [Land Laws, page 113], 'It might be a topic of curious meditation for the student of comparative jurisprudence to note how well the English land-owning families have striven, though all unconsciously, to produce in our modern society something like the image of an archaic Aryan household.'"

On page 264 the author comments on "the curious fact that the Norman dower of one-third the real estate,

which superseded the community of property of our Anglo-Saxon forefathers, is still the rule eight centuries later in a large number of the laws of a race which has no prouder name for itself than Anglo-Saxon."[11]

Anticipating an argument more fully developed later (page 46, *infra*), it is the more "archaic social anatomy" referred to by the French historian, which Congress now seeks to impose upon all the people of the United States in disregard of local tradition or "inveterate policy."[12]

American Continent. Naturally the conflict between the common law and the community system was transplanted to the North American continent, settled by French, Spanish and English. For generations prior to the English conquest of Canada in 1763, the people of a large part of that country had been living under French laws and customs (Howe, *Roman and Civil Law in America,* 16 Harvard Law Review 342, 345 (1903); de Funiak, *Principles of Community Property,* Section 14). And those laws, as to marital property at least, still prevail in the Province of Quebec (*Beaudoin v. Trudel* [1937], 1 Dom. L.R. 216, 221).

By a charter granted in 1712 by the King of France (see *Kaskaskia v. McClure,* 167 Ill. 23, 30, 47 N.E. 72, 73), the royal edicts and the *Coutume de Paris* (including, presumably, the community property system) be-

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[11]The right of dower, given by the common law to the wife in place of a community interest was, we submit, always a flimsy, and with the decline of the economic importance of real property (see *Helvering v. Hallock,* 309 U.S. 106, 118, 84 L. ed. 604 (1940)), it became almost a fraudulent, device. Indeed, the origin of this right, commented on, *infra,* page 57, supports, we believe, the view that dower, an institution adopted by the Norman aristocracy, was never intended to be of great benefit to its beneficiaries.

[12]Mr. Justice Roberts in *Commissioner v. Harmon,* 323 U.S. 44, 89 L. ed. Adv. Ops. 71, at 72 (1944).

came law in the Mississippi Valley and the central Gulf regions originally settled by France (de Funiak, *Principles of Community Property,* Section 40). In 1769, by proclamation of Governor Alexander O'Reilly, the French community system was supplanted by the Spanish (Wigmore, *Louisiana: The Story of Its Jurisprudence,* 22 Am. L.R. 890 (1888); de Funiak, Section 40). For a time prevalent in the east Gulf region, where Spanish law remained in effect until altered by the government of the United States after the cession of Florida in 1819 (*American Insurance Co. v. 356 Bales of Cotton,* 1 Pet. 511, 544, 7 L. ed. 242; de Funiak, Section 44); the community system finally yielded to the common law in the east and central Gulf areas (see *Riddick v. Walsh,* 15 Mo. 519, 535 to 537; de Funiak, Sections 42, 44), save in Louisiana, where it appears to have been consistently adhered to. (See de Funiak, Section 41.)

The southwestern region was part of Spain's new world possessions, and the *Novisima Recopilacion* of Spain, published in 1805, applicable to these territories, continued in effect the community system already established. (Schmidt, pages 88, 98, of *Historical Outline of the Laws of Spain,* cited Note 8, *supra*). Declaring its independence from Spain in 1821, Mexico continued to recognize the community system and later incorporated it into its law. (*Novisimo Sala Mexicano,* Book 1, Section 2a, Title 4 (Mexico, 1870), quoted in de Funiak, Section 15, n. 63); see Schmidt, *supra, Civil Law of Spain and Mexico* (page 12), Book I, Title 1, Chapter IV, Section 1.)[13]

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[13]In the Appendix, page 21, we quote the principal provisions of this strikingly modern law.

It is interesting to compare its enlightened precepts with the contemporary law of England on the same subject as set forth by Blackstone. See Appendix, page 18.

Under its first constitution, adopted at the time of its admission into the Union in 1845, Texas continued the community property system which had become traditional under the Spanish and Mexican regimes (de Funiak, Section 45).

Of five states, California, New Mexico, Arizona, Nevada and Utah, carved out of territory acquired by the United States from Mexico, the two first named continued the community system without interruption; and Arizona and Nevada adopted it shortly after they had experimented briefly with common law systems (Kirkwood, Historical Background and Objectives of the Law of Community Property in the Pacific Coast States, 11 Washington Law Review 1 (1936)). Early Mormon religious practice, naturally sympathetic to common law concepts of a wife's status and marital rights, led to the rejection of the community system in Utah (de Funiak, *supra*, Section 49, page 104).[14]

Of the Oregon Territory, the States of Washington and Idaho, after a period of experimentation with the common law, abandoned it in favor of the community system (Kirkwood, *supra*). Oklahoma, in 1945, independently of pre-existing customs or traditions (except for an experiment with an optional form, 1939 to 1945),

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[14]"No trace of a true conjugal society of goods, governed by the husband, is found in antiquity. Community, which implies a certain equality of rights between spouses, is evidently incompatible with polygamy, which creates a very inferior situation for women." (Gaëtan Aubéry, *La Communauté de Biens Conjugale* (Paris, 1911), page 180; our translation; for the original, see Appendix, page 9.)

adopted a "legal" community property system (House Bill 218, Twentieth Legislature, 1945, approved April 28, 1945, effective July 26, 1945), as did the Territory of Hawaii (Laws 1945, Act 273).

We have stated that community property goes back in its origins at least to the early Christian era. European customs, later crystallized into written laws, were in turn transmitted to the new world. Varying in details which it would serve no present purpose to explore, the community property laws of the various American states adhering to that system are alike in the respect that they confer upon the spouses property rights of equal dignity, constituting the husband the agent of the community for certain purposes. By reason of these similarities, it is possible to discuss the issues presented by the present cases in a broad way, ignoring minor divergences.

Constitutional Questions Involved.

From the survey just completed, it is apparent that the Congressional concept, attaching the *as if* stigma to the wife's interest in community property and ascribing to it a fictional status, is unhistorical and unrealistic. But Congress, pursuing the objective which it sought to reach, had no alternative. Its action is necessarily based on the concept that the wife's interest is unreal, since to admit that the wife *is* a part owner would cause Congress, by its own admission, to transgress three constitutional limitations upon its powers: (1) It would contravene the Fifth Amendment; (2) it would violate the requirement of geographical uniformity; (3) it would become a trespasser upon a field reserved to the states.

II.

The 1942 Act Contravenes the Fifth Amendment.

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *." (Amendment V, Constitution of the United States.)

Manifestly one person's property cannot be included in another's estate for the purpose of assessing death duties. The applicability of this truism to the present case involves the premise that the wife is owner. Elaboration in support of this premise seems unnecessary, because (1) the point, fundamental to the taxpayers' position in the case now before the Court, is fully developed in other briefs on file; and (2) this Court in numerous cases has recognized and defined the wife's interest in community property in terms which, if adhered to now, are amply sufficient to uphold its integrity against Congressional interference.

In *Poe v. Seaborn,* 282 U.S. 101, 111, 75 L. ed. 239 (1930), the Court says, referring to the community property laws of Washington:

> "The books are full of expressions such as 'the personal property is just as much hers as his' (Marston v. Rue, 92 Wash. 129, 159 Pac. 111); 'her property right in it (an automobile) is as great as his' (92 Wash. 133); 'the title of one spouse . . . was a legal title as well as that of the other' (Mabie v. Whittaker, 10 Wash. 663, 39 Pac. 172).
>
> "Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both."

In *Goodell v. Koch,* 282 U.S. 118, 121, 75 L. ed. 247, the Court says, quoting from *La Tourette v. La Tourette,* 15 Ariz. 200, 137 Pac. 426:

> "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal."

In *Hopkins v. Bacon,* 282 U. S. 122, 126, 75 L. ed. 249:

> "* * * the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband * * *."

In *Bender v. Pfaff,* 282 U.S. 127, 132, 75 L. ed. 252:

> "* * * in Louisiana, the wife has a present vested interest in community property equal to that of her husband * * *."

In *Lang v. Commissioner,* 304 U.S. 264, 270, 82 L. ed. 1331:

> "Under the community property statutes of Washington, as interpreted below, one-half of the amounts of community funds applied to payment of premiums was property of the wife. To that extent she paid these premiums. * * *"

The Court's latest expression is the following:

> "The legal community system of the States in question long antedated the Sixteenth Amendment and the first Revenue Act adopted thereunder. Under that system, as a result of State policy, and without any act on the part of either spouse, one-half of the community income vested in each spouse as the income accrued and was, in law, to that ex-

tent, the income of the spouse. * * *" (*Commissioner v. Harmon,* 323 U.S. 44, 46, 89 L. ed. Adv. Ops. 71, 72.)

See also *Warburton v. White,* 176 U.S. 484, 44 L. ed. 555; *Arnett v. Reade,* 220 U.S. 311, 55 L. ed. 477.

For convenience of reference, we note certain other authorities dealing with the quantum and nature of spouses' rights in community property.[15]

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[15](a) *The spouses as owners of their respective shares.*

In addition to United States Supreme Court cases cited above, see:

United States v. Goodyear, 99 F. (2d) 523, 38-2 USTC ¶9532 (C.C.A. 9; Calif.);

Schwartz v. Schwartz, 52 Ariz. 105, 79 P. (2d) 501, 116 A.L.R. 633 (1938);

Siberell v. Siberell, 214 Cal. 767, 772, 7 P. (2d) 1003 (1932);

Bank of America N.T. & S.A. v. Mantz, 4 Cal. (2d) 322, 327, 49 P. (2d) 279 (1935);

Kohny v. Dunbar, 21 Ida. 258, 268, 39 L.R.A. (N.S.) 1107 (1912);

Radermacher v. Radermacher, 61 Ida. 261, 100 P. (2d) 955 (1940), citing earlier Idaho cases;

Estate of Williams, 40 Nev. 241, 161 P. 741, L.R.A. 1917C 602 (1916);

Baca v. Village of Belen, 30 N.M. 541, 240 P. 803 (1925);

Jenkins v. Huntsinger, 46 N.M. 168, 125 P. (2d) 327, 333 (1942);

Arnold v. Leonard, 114 Tex. 535, 545, 273 S.W. 799, 804 (1925);

McJunkin v. Republic National Bank, 131 S.W. (2d) 1085, 1089 (Tex. Civ. App., 1939);

Occidental Life Insurance Co. v. Powers, 192 Wash. 475, 74 P. (2d) 27, 114 A.L.R. 531 (1937), citing earlier Washington cases;

Re Coffey's Estate, 195 Wash. 379, 81 P. (2d) 283 (1938).

See also:

de Funiak, Sections 105 *et seq.*

(b) *The spouses as partners.*

Bender v. Pfaff, 282 U.S. 127, 131, 75 L. ed. 252 (1930);

Goodell v. Koch, 282 U.S. 118, 121, 75 L. ed. 247 (1930);

Fuller v. Ferguson, 26 Cal. 546, 566 (1864);

Property rights acquired by the spouses under community property law continue in full vigor on removal of the matrimonial domicile to, or the investment of community funds in property located in, a non-community state (*Succession of Popp,* 146 La. 463, 83 So. 765; *Depas v. Mayo,* 11 Mo. 314; *Edwards v. Edwards,* 108 Okla. 93, 233 Pac. 477; *Johnson v. Commissioner,* 88 F. (2d) 952, 955 (C.C.A. 8), s. c., 105 F. (2d) 454, cert. den. 308 U.S. 625; I.T. 1268, I-1 C.B. 234 (1922); 3 Mertens Law of Federal Income Taxation, Section 19.33; Restatement, Conflict of Laws, Section 292; 2 Beale, Conflict of Laws, Section 292.1; Horowitz, Conflict of Laws in Community Property, 11 Wash. L.R. 212, 221, 222). Indeed, the final authority in the United Kingdom has applied this principle to a case where the wife's right in

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Kohny v. Dunbar, 21 Idaho 258, 121 P. 544, 39 L.R.A. (N.S.) 1107 (1912);
Succession of Wiener, 203 La. 649, 14 So. (2d) 475 (1943), app. dism. 321 U.S. 253;
Marston v. Rue, 92 Wash. 129, 159 P. 111 (1916);
de Funiak, Section 95.

On recognition of marital partnership for estate tax purposes, see L. L. Fletcher Estate, 44 B.T.A. 429 (1941; acq.).

(c) *The spouses as tenants in common.*

Some authorities suggest an analogy between community property and tenancy in common:

Warburton v. White, 176 U.S. 484, 496, 497, 44 L. ed. 555 (1900; community property is common property);
Williams Estate, 40 Nev. 241, 161 P. 741, L.R.A. 1917C 602 (1916);
Re Coffey's Estate, supra (undivided one-half interest).

Interests held by tenants in common are severable for tax purposes. *Estate of Irwin A. Smith,* 45 B.T.A. 59 (1941; acq.); Reg. 105, Section 81.22 (first paragraph, last sentence).

That there are irreconcilable differences between tenancy by the entirety or joint tenancy on the one hand, and community property on the other is pointed out clearly in the appellees' briefs in these cases, in connection with *Tyler v. United States,* 281 U.S. 497, 74 L. ed. 991, and *United States v. Jacobs,* 306 U.S. 363, 83 L. ed. 763. We concur in what is said there.

movables acquired in a common law jurisdiction, was merely equitable, based upon the consequences which the community property law of the place of marriage—the then domicile of the parties—attached to marriage (*De Nicols v. Curlier* (1900), A.C. 21 (H.L.); see also *De Nicols v. De Nicols* (1900), 2 Ch. Div. 410, applying the same principle to real property interests acquired in the common law jurisdiction). It seems, however, that the American authorities have not carried to this particular extent the doctrine of contract implied from the mere fact of marriage under the community property regime. (See *Saul v. His Creditors,* 5 Mart. (N. S.) 569 (La., 1827)).

The authorities cited show that the law of the new domicile will afford an appropriate remedy to protect rights acquired in the old, either by raising a trust in favor of one spouse (usually the wife) or by treating the spouses as co-owners.

As the present Chief Justice has well pointed out in an opinion rendered while Attorney General (34 Ops. Atty. Gen. 395, 402, Treasury Decision 3670, IV-1 C.B. 20, 24), there are difficulties in applying common law terminology to community property. Admitting that difficulty, we believe it to be one which the Court, following the uniform course of decision in the community property states, has itself satisfactorily resolved, by attributing equal ownership to the spouses. Courts of common law states faced with the problem of protecting the spouses' interests in property, community in origin and brought within their borders, have resolved it by applying the same concept.

In view of the fact that this Court, the courts of the community property states themselves, and, on appropriate occasion, the courts of states to which community

property is a stranger, all concur in applying this test, is it not too late to say that for tax purposes, *and for tax purposes only,* the wife's interest is less than that which the governing law says it is? Admitting that ownership of property furnishes a sound basis for taxation, the tax laws, we submit, may not be permitted to supply their own standards for determining whether ownership exists. We shall consider presently (see page 26, *infra*) whether there is some basis other than ownership on which the tax can be sustained.

Referring to a state statute which in effect compelled one person to pay another's tax, this Court said in *Hartman v. Greenhow,* 102 U.S. 672, 684, 26 L. ed. 271 (1881):

> "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger can not be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall if at all upon another."

Property which a decedent has owned but has effectually parted with during his lifetime may not be brought back into his estate for tax purposes by subsequently enacted laws. (*Nichols v. Coolidge,* 274 U.S. 531, 71 L. ed. 1184 (1927; federal estate tax); *Coolidge v. Long,* 282 U.S. 582, 75 L. ed. 562 (1931; state inheritance tax).) Property similarly parted with may not be brought back into the estate by laws establishing a conclusive presumption as to the motives attending its transfer. (*Schlesinger v. Wisconsin,* 270 U.S. 230, 70 L. ed. 557 (1926; state statute); *Heiner v. Donnan,* 285 U.S. 312, 76 L. ed. 772 (1932; Federal Estate Tax Act).)

The tax being on the interest which ceases at death (*Y.M.C.A. v. Davis,* 264 U.S. 47, 68 L. ed. 558; *Edwards v. Slocum,* 264 U.S. 61, 68 L. ed. 564; *Chase National Bank v. United States,* 278 U.S. 327, 73 L. ed. 405), some substantial interest must cease at death to give rise to a taxable event. (See also authorities, page 31, *infra.*)

If, as the opinion in *Heiner v. Donnan* points out, the value of a decedent's estate cannot be enhanced by the "fictitious inclusion" of property given away within two years prior to his death, with how much stronger reason may it be said that the estate cannot be enhanced by the fictitious inclusion of property which the decedent never owned at all.

The *Donnan* case condemns an attempt to measure a tax on one person's property by imputing to it in part the value of property of another, as "not taxation, but spoliation" (page 327 of 285 U.S.). Of tax burdens distributed in accordance with another's wealth, the Court (quoting Judge Learned Hand in *Frew v. Bowers,* 12 F. (2d) 625, 630), refers to the "grievous injustice" occasioned by that procedure.

Concerning an analogous question, that of the right to measure a husband's income by income belonging in part to his wife, this Court has said in *Hoeper v. Tax Commission,* 284 U.S. 206, 215, 76 L. ed. 248 (1931), a case coming up from Wisconsin and involving its income tax law:

> "Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in

part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U.S. 41, 77, 44 L. Ed. 969, 20 S. Ct. 747, is apposite:

"'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v. Coolidge, 274 U.S. 531, 540, 71 L. ed. 1184, 1192, 52 A.L.R. 1081, 47 S. Ct. 710.)"

We are aware that the great and revered Justice Holmes—Justice Brandeis and the present Chief Justice joining—dissented in the *Hoeper* case. That dissent detracts not at all from, indeed it supports, the authority of the majority decision as applied to the instant cases. Justice Holmes was upholding the authority of the state legislature over a matter of state concern, as we are here. Differing from the majority, he thought the legislature could go back to a common law rule if it saw fit.[16]

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[16]The Holmes philosophy of non-interference with state laws is well stated in his dissent in *Truax v. Corrigan*, 257 U.S. 312, 344, 66 L. ed. 254.

No conflict between state and federal authority over a state's internal concerns was involved. To reason that because Justice Holmes considered the state an agency competent to deal with its internal economy in that case, he would believe the federal government empowered in this to *overrule* that same agency, dealing with the same subject matter, seems lacking in coherence.

It is believed that the authorities cited above establish that a tax cannot be levied upon the property or estate of one person in respect of the property or estate of another; and that the inclusion of one person's *community* estate with another's for purposes of taxation falls within the condemnation of the same just principle. The federal estate tax being levied on the "exercise of the privilege of directing the course of property after a man's death" (*Estate of Rogers v. Helvering,* 320 U.S. 410, 413, 88 L. ed. 134), and that privilege being here non-existent, there is no subject matter to which the tax can apply.

Basis and Scope of the Federal Estate Tax.

It is appropriate to note at this point an argument advanced by the Attorney General (see App. Br., *Wiener* case, pp. 22, 58, 59, *et seq.*) that ownership is not the exclusive basis of estate taxation. Admitting that generality, it becomes necessary, in order to determine the validity of the further conclusion that the wife's rights with respect to her share of the community property are "enlarged" by her husband's death in such sense or degree as to subject them to taxation at his death (App. Br., *Wiener* case, pp. 22, 61), to inquire what bases are here employed, and what are permissible.

Ownership, as has been said, is one test. The gross estate includes all property "to the extent of the interest

of the decedent therein" (Sec. 811(a), I.R.C.). The surviving spouse's interest as dower or curtesy—an expectancy depending upon the spouse's survival to determine whether it ever comes into existence—is included (811(b)). Substitutes for testamentary disposition—transfers in contemplation of death (811(b))—are included, as are those transfers whereby the transferor has retained the substance, total or partial, of ownership through retention of economic benefits—possession or enjoyment, income, right to designate the final takers, or to revoke (811(c), (d)).

The next category, joint interests (811(e)(1)), presents in one aspect a substitute for testamentary disposition. The further fact that on one joint tenant's death, the survivor is freed from the hazard of a transfer, voluntary or involuntary, by his co-owner, whereby the survivor's right to take the whole of the property would have been defeated, makes plain the "accessions to the survivor's property rights," and justifies the tax (*Gwinn v. Commissioner,* 287 U.S. 224; 229, 77 L. ed. 270; *United States v. Jacobs,* 306 U.S. 363, 83 L. ed. 763). To close the door to facile evasion, the Act looks back to the original source of the property, even though it may have been in whole or part acquired by the surviving joint tenant by a gift from the co-owner made prior to the enactment of the Federal Estate Tax Act (*Dimock v. Corwin,* 306 U.S. 363, 83 L. ed. 763).

The remaining category, powers of appointment (811 (f)), requires no comment. If the provisions of Section 811(e)(2) relating to power of testamentary disposition stood alone, there could be no valid objection on the part of the community property states. (See *Whitney v. State Tax Commission,* 309 U.S. 530, 84 L. ed. 909.)

Where, among the enumerated categories, does the present attempt at taxation fall? It is not based on ownership (811(a)), for the deceased husband did not own his wife's share of the community property (see cases cited, page 19, *supra;* also Note 15); not on dower (811(b)), for the wife's vested interest has no resemblance to this expectancy; not on substitute for testamentary disposition (811(c)), for the husband had no power to dispose of his wife's share; not on economic benefits retained (811(c)(d)), for the husband had none as to his wife's share, except a non-beneficial, perhaps indeed burdensome, power of control as statutory agent; nor is it based on power of appointment, non-existent as to his wife's share.

Failing to bring the case within any known classification, it is not surprising that the Government, groping among "shadowy and intricate distinctions of common law concepts and ancient fictions" (*United States v. Jacobs,* 306 U.S. 363, 369, 83 L. ed. 763), seeks to find some minute alteration in the survivor's relationship to the property which justifies the tax (see App. Br. p. 33 *et seq.*). The argument cuts both ways. True, the surviving wife has the power, formerly restricted but now full, to alienate the property. On the other hand, all questions of mere sentiment aside, having lost the services of her statutory agent, she must assume the burdens of management. Either through her agent acting alone, or, in case of real property, by acting in concert with him, she could always alienate or encumber, if that is beneficial.[17] Does this accession to her power—and to her

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[17]From the existence of restrictions on the wife's power of disposition of community property while her husband is living it is not to be inferred that she has no alienable interest. There would seem to be no doubt of the wife's power to make a binding agree-

responsibility—have the effect of passing to the surviving wife the "substantial rights" of which the Court speaks in *Tyler v. United States,* 281 U.S. 497, 503, 74 L. ed. 991, or of "bringing into being or the enlargement of property rights" (*id.,* p. 502), or of "definite accessions to the property rights" (*id.,* p. 504) of the surviving spouse? To say that anything less than *substantial* benefits must be transmitted in order to give rise to the tax would be inconsistent with this Court's intensely practical concept of taxation, often reiterated and unfailingly applied.

In the *Tyler* case, the Court is speaking throughout of "property rights"—with particular appropriateness, because until her husband's death, Tyler's widow had no assurance that she would ever own or possess the property in question, and the same applies to the joint tenancy involved in *United States v. Jacobs,* 306 U.S. 363, 83 L. ed. 763. In the instant case, the surviving widows

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ment to leave a will disposing of her share of the community property in a particular manner. *Sonnicksen v. Sonnicksen,* 45 Cal. App. (2d) 46, 113 P. (2d) 495. On the point that heirs or other persons receiving property descending or left to them in contravention of such an agreement become involuntary trustees for the promisee, and that the agreement is in effect specifically enforcible, through recognition of the implied trust, see *Sonnicksen v. Sonnicksen, supra; Fowler v. Hansen,* 48 Cal. App. (2d) 518, 522, 120 P. (2d) 161; *Notten v. Mensing,* 3 Cal. (2d) 469, 45 P. (2d) 198; *Jones v. Clark,* 19 Cal. (2d) 156, 119 P. (2d) 731. The rule just stated is not peculiar to community property but prevails generally. See 4 *Page on Wills* (3rd ed.), Section 1736.

The same reasoning leads to the conclusion that a wife has the power to make a conveyance, effective at her husband's death, of her share of the community property. The case of *Lynch v. Lynch,* 207 Cal. 582, 279 P. 653, involving a 1916 transfer, so holds. In view of the fact that in 1927 the wife was given a "present, existing and equal interest" with her husband in community property (California Civil Code, Section 161a) it is apparent that the same result could now be reached on grounds supplemental to or independent of the ground—after-acquired interest—relied on by the court.

owned an interest which no contingency could defeat, either before or after their husbands' deaths.[18] And it must be remembered that, since this is a transfer, not a succession statute, any "accession" to the widows' rights must come from their husbands (see cases cited p. 24, *supra*, p. 35, *infra*, also Note 18). Otherwise there is no subject matter to which the tax can apply.

In a further effort to find a supporting basis for the

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[18]The Government's reliance (App. Br. pages 7, 44) on *Moffitt v. Kelly*, 218 U.S. 400, 54 L. Ed. 1086 (1910), is misplaced. That case arose in 1906, some seventeen years before a wife in California had even the power of testamentary disposition over her half of the community property (see Calif. Stats. 1923, page 30). Her rights constituted a mere expectancy, as this Court was later to hold in *United States v. Robbins*, 269 U.S. 315, 70 L. ed. 285 (1926). The additions to the wife's rights in community property which culminated (1927) in Section 161a of the Civil Code, declaring that the "respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests * * *" were given recognition by this Court in *United States v. Malcolm*, 282 U.S. 792, 75 L. ed. 714.

The controlling facts just recited must be kept in mind in connection with the Court's assumption in the *Moffitt* case that "the wife's interest in the community property was a vested right which could not be impaired by subsequent legislation." (Page 403 of 218 U.S.) The wife's rights being "vested," to the extent and only to the extent noted above, it is not surprising that the Court reached the further conclusion that it was within the power of the state "to select the vesting in complete possession and enjoyment by wives of their shares in community property, consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof" as a taxable event. It is to be noted also that in the *Moffitt* case the Court was dealing with a succession, not a transfer tax. (See *United States Trust Co. v. Helvering*, 307 U.S. 57, 60, 83 L. ed. 1104; *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155, 73 L. ed. 647; *Knowlton v. Moore*, 178 U.S. 41, 49, 44 L. ed. 969; *Paul, Federal Estate and Gift Taxation*, Section 1.05). In *Moffitt v. Kelly*, there was a definite "accession" to the wife's rights at her husband's death. She had nothing tangible before. Without further elaboration on this point, we concur in what is said in the briefs of the appellees regarding the applicability of *Moffitt v. Kelly* to the present situation.

tax, the Government (App. Br. p. 38), reverts to the Congressional concept that the wife's interest is a fiction. We have endeavored to show throughout this brief that this theory is unsupportable in fact or law. If the wife's ownership is accepted, as we believe it must be; if the theory of substantial accession to her rights in her community half at her husband's death, sufficient to constitute a taxable event, is rejected, as we believe it must be; it must follow that the Government, following the joint tenancy analogy, is remitted to going back to the source—finding to whom the property is "economically attributable." Whether the Government can attribute the entire property to one spouse in defiance of state law, one of the major problems dealt with in this brief, is discussed under Points IV and V, *infra.*

III.
The 1942 Act Contravenes the Requirement That Excise Taxes Be Uniform.

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; * * *." (Constitution of the United States, Article I, Section 8, Clause 1.)

The contention made under this heading is founded upon the conviction that the uniformity clause was inserted for a purpose, and the belief that the instant case presents an unprecedented situation, favorable to its application.

The federal estate tax is an excise upon the privilege of transmitting property at death (*United States Trust Co. v. Helvering,* 307 U.S. 57, 83 L. ed. 1104; *Porter v. Commissioner,* 288 U.S. 436, 77 L. ed. 880). To bring

the statute into operation, death must be the "generating source" (*Knowlton v. Moore*, 178 U.S. 41, 56, 44 L. ed. 969). It must be "the source of valuable assurance passing from the dead to the living" (*Porter v. Commissioner, supra*). The subject matter of the excise is "the transfer of or shifting in relationships to property at death" (*United States Trust Co. v. Helvering, supra*).

It is true that this Court has said in *Poe v. Seaborn*, 282 U.S. 101, 117, 75 L. ed. 239, as in other cases, that "differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity." In the instant case, differences of state law do not have to be read into the Act. Congress has itself read these differences into the Act by limiting the applicability of certain provisions to those states in which the community system prevails.

This, we believe, makes clear the fallacy underlying the Government's statement (App. Br., *Wiener* case, p. 8) that any disadvantage resulting to the community property states from this legislation "would be the result not of the federal statute, but of differences in state laws," citing *Florida v. Mellon*, 273 U.S. 12, 71 L. ed. 511. In that case, Florida, by its own constitution, had incapacitated itself from taking advantage of a privilege made available by federal law to *all* the states. In the instant cases, no privilege is accorded but a tax is imposed. It is imposed, moreover, not in all the states but only where the community system prevails, rejecting in those states, while accepting in all others, the tests supplied by state law to determine "the extent of the interest of the decedent" in property. The 1942 Act invents, in the case of the husband, an interest which does not exist. *Except*

for the purpose of taxing the wife's estate, it purports to nullify the interest which the state law says she has.

Directed and limited as the 1942 Act is, affecting only nine states, it does not operate with geographical uniformity with respect to the transfer of property. It is no answer to say that the statute applies in whatever states may now or hereafter come within the named category. Still undisposed of is the fact that the community relationship is made the object of special and discriminatory legislation not made applicable to other property relationships essentially indistinguishable from it. (See argument under Point II, *supra.*)

The language of this Court in *Knowlton v. Moore,* 178 U.S. 41, 89, 44 L. ed. 969, 988, is applicable to the present cases:

> "Giving to the term uniformity as applied to duties, imposts and excises a geographical significance likewise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts or excises upon a particular subject in one state and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

Discussing the same point, the Court (page 84) states a contention of counsel respecting this matter which the opinion later upholds, as follows:

> "* * * the words, 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be

made operative throughout the United States; that is to say that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States and at the same rate."

The 1942 Act does not make operative "the same plan and the same method * * * throughout the United States." Since essentially similar property relationships in non-community states, namely, property held by the wife as a tenant in common or partner with her husband, go free at the husband's death, the 1942 Act does not tax the same subject "everywhere throughout the United States." Since the method of taxation devised by the Act results in including in the husband's estate property which he does not own, it taxes the transfer of property which he *does* own at a higher rate than would otherwise be applicable to him, and at a higher rate than would be applicable to the same property in a non-community property state. The Act therefore does not tax the same subject "at the same rate." It does the very thing which this Court in the first excerpt above quoted says cannot be done, namely, it levies an excise "upon a particular subject in one state and a different duty, impost or excise on the same subject in another." In terms directed only at certain states—a feature which it is believed will not be found in any other excise statute—it is for that reason *prima facie* at variance with the requirement of geographical uniformity. But aside from this, it is at variance with that requirement for the further reason, not patent upon the face of the statute itself, that in determining whether transfers are subject to or free from

taxation, it applies inconsistent and arbitrary, and therefore non-uniform, rules.

Since it is the shifting of economic benefits, or the privilege of transfer, which is taxed (*United States Trust Co. v. Helvering,* 307 U.S. 57, 83 L. ed. 1104; *Estate of Sanford v. Commissioner,* 308 U.S. 39, 43, 84 L. ed. 20), it follows that if no benefits (as to the wife's community half) are shifted at the husband's death, there is no subject matter on which the tax can operate. Death is not, as to the wife, the generating source of any new economic interest.[19] It has only removed one who stood in the relationship of a statutory agent with respect to the property (*Poe v. Seaborn,* 282 U.S. 101, 75 L. ed. 239). As well might it be said that a principal is to be taxed at his agent's death, or a *cestui que trust* at the death of the trustee. Nowhere, save in the community property states, is a tax exacted from the beneficial owner upon the death of a person exercising only managerial powers over the owner's property[20]—non-beneficial powers which the legislature gave and can take away at will.

In thirty-nine states only that property is included in the husband's taxable estate which answers to one of the tests summarized above (see pages 26 to 28, *supra*), deemed sufficient to give rise to the taxable event, the shifting of economic benefits, at his death. In nine states, under the 1942 Act, property is included as to which these

[19]See *Whitney v. State Tax Commission,* 309 U.S. 530, 538, 84 L. ed. 909.

[20]On the cessation of such powers as a non-taxable event, see *Estate of Williams,* 40 Nev. 241, 161 P. 741, L.R.A. 1917C 602 (1916).

indispensable conditions do not exist. This results in two inequalities, both violative of the uniformity requirement:

(1) Property not owned by the decedent, the devolution of which he could not control, as to which no valuable assurance passed at his death to the living (*Porter v. Commissioner*, page 32, *supra*), is brought within his taxable estate.

(2) As a consequence, the property which is rightly included within his taxable estate is subjected to higher rates because of this wrongful inclusion.

It would be inaccurate to say that this is but another way of stating the argument based upon the Fifth Amendment, namely, that the property not being the decedent's cannot be taxed at all.[21] The Act might run the gamut of the Fifth Amendment, and still fail in the uniformity test, because it singles out for taxation a property system—an incident of the marital relationship, non-existent in its absence—and says that property rights arising out of that system shall be subjected to a discriminatory burden. This denies uniformity, to the disadvantage of those communities of the Union whose legislative and social policy has given origin to the rights now subjected to discrimination.

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[21]In so far as the claims of the community property states are based only on unreasonable classification or inequality in the incidence of the tax, it seems that the Fifth Amendment affords them no remedy. *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 86 L. ed. 343 (1941); *Hirabayashi v. United States*, 320 U.S. 81, 87 L. ed. 1774 (1943).

IV.

The 1942 Act Invades the Powers Reserved to the States.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Amendment X, Constitution of the United States.)

The instant cases present an issue going beyond the Fifth Amendment and the uniformity clause—points previously dealt with. The Act, we respectfully submit, constitutes an interference with state policy and economy. If a state says that the wife's contribution to community earnings is equal to the husband's, can that view be said to be so palpably erroneous that Congress may override it at will?

A present-day writer states the social theory underlying the community property system:

> "* * * actually there is attached to the marriage a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage. The wife usually remains the home maker, the husband the bread winner, and because his share thus has to do with the earnings and properties acquired their management remains in his hands." (de Funiak, Principles of Community Property, Section 95, page 265.)

See also authorities cited under heading V, *infra.*

Tersely, in an opinion which this Court has quoted (*Poe v. Seaborn,* 282 U.S. 101, 111), the Washington Court expresses the community concept: "The personal property is just as much hers as his. * * * Under our law she

has helped to create it as much as he." (*Marston v. Rue*, 92 Wash. 129, 131, 159 P. 111 (1916).)

The community property states have created a system of property rights based upon the belief that accumulations of property, the product of labor, are attributable to the wife equally with the husband; or upon a policy which courteously ascribes to them a corresponding ownership. The belief may be erroneous. The policy may be attributed, flatteringly, to generosity to women, or less flatteringly to duress on their part. Whatever the actuating motives, Congress still may not interfere with the system merely because it looks strange to residents of other states and to lawyers schooled only in the common law.

The theory applied by Congress—unintentionally, we believe—that it can promote or render nugatory state systems of property laws as it will, does not stand scrutiny. The most extreme advocates of the common law system will doubtless concede that the wife's contribution to the marital enterprise is worth *something*. This would be true even though limited to the case quaintly put by *Brissaud* (*op. cit.*, page 836) of the wife performing her part "as mistress of the house, as pictures show her, carrying her keys and her purse at her belt." How much are the wife's services worth, if, as Congress thinks, fifty per cent is too much? Would forty per cent be reasonable? Or thirty? Who will bid twenty-five? Am I offered twenty? It should be possible to pursue this inverted auction to a figure which even bachelors will say is reasonable. That measure of compensation being reached, and assuming it is allowed by state law, has Congress the power to take it away from the wife at the husband's death?

Human relationships being what they are, their component elements are difficult to appraise. The apparently

imponderable may outweigh the outwardly weighty and substantial. Who has not known cases where the wife was the dynamic or at least the conserving agency? If, as we consider it reasonable to suggest, the wife's contribution has *some* value, the matter of appropriate reward is solely a question of how much—a matter referable to state law. The spouses are partners (see Note 15, *supra*), a relationship which presupposes an element of give and take. Such cases do not call for the use of mathematical formulae of such exactness as a physicist dividing an atom might require. Approximations are sufficient. If the state law says fifty per cent is reasonable for the wife's contribution, can Congress say that the reward is exorbitant, and only some lesser amount, or nothing, is to be awarded?

The community states have said that fifty per cent of the acquests is a proper reward. This Court has recognized and given the appropriate consequences to this exercise of state power (see *Poe, Goodell, Hopkins, Bender, Lang, Harmon* cases, all cited *supra;* see also *Warburton v. White,* 176 U.S. 484, 44 L. ed. 555 (1900; Washington); *Arnett v. Reade,* 220 U.S. 311, 55 L. ed. 477 (1911; N.M.);[22] *United States v. Malcolm,* 282 U.S. 792, 75 L. ed. 714 (1931; Calif.)).

The framers of the Constitution did not freeze into it common law property concepts.

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history, but it was made for an undefined and expanding

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[22] As the opinion in *Arnett v. Reade* points out, page 319 of 220 U.S., there is nothing in *Garrozi v. Dastas,* 204 U.S. 64, 51 L. ed. 369 (1907) which is inconsistent with the uniform course of the Supreme Court's holdings regarding the rights of spouses in community property.

future, and for a people gathered and to be gathered from many Nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. * * *" (*Hurtado v. California,* 110 U.S. 516, 28 L. Ed. 232.)

The concepts of marital property rights which the common law sponsored are not necessarily those adapted to the needs of "an undefined and expanding future," nor is their continuance necessarily contemplated "in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" (*Marshall, C.J., in M'Culloch v. Maryland,* 4 Wheat, 316, 415, 4 L. ed. 579). Realistically and impartially surveyed, those concepts are part of the "feudal economy," now somewhat in disrepute (*Helvering v. Hallock,* 309 U.S. 106, 118, 84 L. ed. 604),[23] to which the 1942 Act seeks to impel return.

Property rights are a part of the vast sphere affecting the people in their daily lives, reserved to the states respectively or to the people under the Tenth Amendment. To say that property belongs entirely to the husband when the law under which it came into existence says one-half of it belongs to the wife, is to substitute a federal for a state system of property rights. To sustain Congress in de-

[23]Not only has the Court shown somewhat less than full respect for the "feudal economy." It has on various occasions disengaged "the dead hand of the common law" by which that economy was supported. *Rosen v. United States,* 245 U.S. 467, 471, 62 L. ed. 406 (1918); *Funk v. United States,* 290 U.S. 371, 378, 78 L. ed. 369 (1933); *United States v. Provident Trust Co.,* 291 U.S. 272, 78 L. ed. 793 (1934). We shall endeavor to show that the marital property systems of the common law states still lean upon that same dead hand.

rogating from property rights conferred by state law, putting them on an *as if* basis, destroying the substance and leaving only the shadow, is to substitute a federal for a state system of property rights.

This attempt to add to the husband's rights, and to derogate from the wife's, goes beyond the authority of Congress.

> "When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America but from the people of the several states; and remain after the adoption of the constitution what they were before, except so far as they may be abridged by that instrument." (Marshall, C.J., in *Sturges v. Crowninshield,* 4 Wheat. 122, 193, 4 L. ed. 529, 548 (1819).)

> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." (Marshall, C. J., in *Dartmouth College v. Woodward,* 4 Wheat. 518, 629, 4 L. ed. 629, 657 (1819).)

Conceding that the national government has "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" (*United States v. Darby,* 312 U.S. 100, 124, 85 L. ed. 609 (1941)), it is still sound constitutional doctrine that "the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." (*United States v. Cruickshank,* 92 U.S. 542, 551, 23 L. ed.

588, 591 (1876).) It is as true now as it was in John Marshall's day that the government is "one of enumerated powers." (Marshall, C.J., in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. ed. 579, 601 (1819).)[24]

The domain of property rights is reserved exclusively to the states.

> "The power of the State to limit the tenure of real property within her limits and the modes of its acquisition and transfer and the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. * * * The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority." (Field, J., in *United States v. Fox*, 94 U.S. 315, 320, 24 L. ed. 192 (1887).)[25]

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[24]See also *United States v. Butler*, 297 U.S. 1, 63, 80 L. ed. 477, 487 (1936); *Screws v. United States*, 89 L. ed. Adv. Ops. 1029, 1040 (1945).

[25]*Federal taxation as dependent upon property rights determined by state law.* On state law as governing possibility of revesting trust property in the grantor, see *Helvering v. Stuart*, 317 U.S. 154, 161, 87 L. ed. 154 (1942). State law determines upon whom local taxes are imposed. *Magruder v. Supplee*, 316 U.S. 394, 396, 86 L. ed. 1555 (1942). See also *Freuler v. Helvering*, 291 U.S. 35, 78 L. ed. 634 (1934); *Blair v. Commissioner*, 300 U.S. 5, 81 L. ed 465 (1937); *Uterhart v. United States*, 240 U.S. 598, 60 L. ed. 819 (1916); *Sharp v. Commissioner*, 303 U.S. 624, 82 L. ed. 1087 (1938). We note also the following non-tax cases on the supremacy of state law in matters affecting property rights: *Huddleston v. Dwyer*, 322 U.S. 232, 88 L. ed. 1246 (1944); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 85 L. ed. 109 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 85 L. ed. 139 (1940).

It will be admitted that "the revenue laws are to be construed in the light of their general purpose to establish a nation-wide

Without multiplying quotations, the following recognize or apply in one form or another the principle that the state is sovereign except as to those matters which the Constitution commits to the Federal government:

Pennoyer v. Neff, 95 U.S. 714, 722, 24 L. ed. 565, 568 (1878);

Yonley v. Lavender, 88 U.S. 276, 22 L. ed. 536 (1875);

Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315, 338-340, 80 L. ed. 251 (1935).

The same rule applies to another question incidentally arising here, namely, the subject of the relationship of husband and wife, which this Court has held "belongs to the laws of the states and not to the laws of the United States." (*Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383, 74 L. ed. 489 (1930); see also *Williams v. North Carolina*, 89 L. ed. Adv. Ops. 1123, 1128 (1945).) A recent decision recognizes "property interests" as one of the "commanding problems in the field of domestic relations with which the state must deal." (*Williams v. North Carolina*, 317 U.S. 287, 298, 87 L. ed. 279 (1942)).

scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." (*United States v. Pelzer*, 312 U.S. 399, 402, 85 L. ed. 913; see also *Morgan v. Commissioner*, 309 U.S. 78, 84 L. ed. 585.) To say that Congress may define a future interest (*Pelzer* case), or a general power of appointment (*Morgan* case), stops far short of saying that a federal statute purporting to tax *transfers* can tax the devolution of property *not transferred at all*, because under the state law which determines ownership, it does not belong to the transferor. As well might Congress say that the wife's property would be included in the husband's estate for federal estate tax purposes; or to make the parallel complete, that this inclusion would be required only in certain designated states.

In the 1942 Act, Congress is seeking to withdraw one of the incidents of the marital relationship from state control. If Congress, preferring the common law rule which regards property acquired during marriage "as belonging entirely to the husband," can employ that fiction as a basis of taxation in defiance of state law which says that it belongs in part to the wife, then a wide gap has been opened in the line protecting state authority over property rights from Federal encroachment. If Congress can say that in one state a transfer of 100% is taxed on that basis, and that in another a transfer of 50% is taxed as though it were 100%, there is manifest discrimination; and if, going still further, Congress can say that a person (the wife) who has *no* interest in the property which Congress is willing to recognize, is nevertheless taxed on the basis of owning 50%, there is manifest injustice. If the 1942 Act is upheld, is it probable that the community property states can withstand the pressure to go over to the system under which taxation bears some relation to, and does not ignore, ownership?[26] The retrogressive nature of such a move, and of

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[26] A simple illustration will make clear the discrimination involved, and the consequent pressure on the community property states to go back to the "more archaic" social system (see *Brissaud*, page 14, *supra*). In a community state, on the wife's death, the 1942 Act subjects to taxation at least one-half of the community property. There is no corresponding exaction in non-community states. Assuming a five year period of survival between spouses, that the spouses leave to each other (as, it is believed, they should be privileged to do) their respective shares of property acquired during the marriage, and that the wife will predecease the husband in 50% of the cases, the following results: (1) In both community and non-community states, on the husband's death prior to the wife, all the property is subjected to the tax. Thus far (ignoring, for the moment, the fact that the husband's estate is taxed in respect of property he does not own), there is parity. (2) In non-community states, there is no tax on the wife's death prior to the husband, the tax being applicable only on his subsequent decease. (3) In the community states,

a law which impairs or infringes upon the more enlightened and generous property system, will be commented on later.

When the Federal government attempts to invade a field of action reserved to the states, it is not important that the attempted invasion is made under the guise of a taxing Act. In *Linder v. United States,* 268 U.S. 5, 17, 69 L. ed. 819, 823 (1925), the Court says:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced.[27]

When Congress, under the guise of a taxing Act, ignores property rights attaching at the moment of acquisition and recognized in full vigor by state law, its acts are in derogation of the authority of the states. The Federal Estate Tax Act is concerned only with *transfers*—those transfers occurring at, made in contemplation of, or rendered fully effectual only by death. To say that the transfer of A's property to B at A's death is taxable, is

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there is a tax on 50% of the property on the wife's death prior to that of the husband (50% of the cases), the tax again being applicable on his subsequent decease.

The writer of the note in 58 Harvard Law Review 742, referred to page 6, *supra,* concedes that "the community does bear a heavier tax burden when the wife predeceases the husband," citing *Jackson, New Federal Estate and Gift Taxes on Community Property,* 21 Tax Magazine 535.

[27]See also *United States v. Butler,* 297 U.S. 1, at 69, 80 L. ed. 477 (1936).

undoubtedly within the power of Congress. To say, however, that A's title will be expanded or diminished according to the will of Congress, ignoring the state law which alone grants and governs the right to acquire and to own, is to permit Congress to set aside the laws of the several states and to regulate their internal economy to a degree hitherto without precedent.

V.

The 1942 Act Invades the Right of the States to Regulate Their Internal Economy and Social Policy.

Under this heading, supplemental to that immediately preceding, we shall point out certain additional considerations which, we believe, make clear the manner in which the 1942 Act encroaches upon state authority, and the extent of that encroachment; also its possible consequences if the 1942 Act is sustained.

In *Commissioner v. Harmon,* 323 U.S. 44, 46, the Court refers to a community which is "made an incident of marriage by the inveterate policy of the state." That is the type of community which the present *amici curiae* are seeking to uphold. In supporting the "inveterate policy" of the states here represented, we think it proper to refer to some of the reasons, founded on concepts prevailing in those states as to what is necessary to achieve a good society, which have led to the adoption and continuance of the community system rather than any of the multitude of systems having common law origins. These reasons will illustrate the close dependence of marital property systems upon local policy, showing that external interference with the one necessarily infringes upon the other.

In the present cases the recurring problem of conflict between state and federal authority is presented in an

acute and novel aspect. For the first time, as far as our research has revealed, in its long and honorable history, Congress has written into the laws of the land, under the guise of a tax law, an enactment which restricts the minority of the states in the management of their own domestic economy, impairing their status as autonomous and equal partners in the federal union. And not only has Congress accomplished this unprecedented, and we believe, unconstitutional result. Unconsciously it has taken a step which is likely to impel these states to retrogressive measures, contrary to the spirit and tendency of the age. It would be a reflection upon the Court which pronounced such judgments as those in *Muller v. Oregon,* 208 U.S. 412, 52 L. ed. 551, and in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L. ed. 703,[28] to say that it is or should be indifferent to the social implications of its decisions.

We quote, not as criticism, but as expressing the point of view of an illustrious scholar, the following from Oliver Wendell Holmes' "The Path of the Law" (*Collected Legal Papers,* page 184):

> "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. * * * I cannot but believe that if the training of lawyers

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[28] See also cases cited, Note 39, *infra.* And see generally, Haines, The Role of the Supreme Court in American Government and Politics (University of California, 1944), page 26 *et seq.;* Frankfurter, Law and Politics (New York, 1939), page 48 *et seq.;* also by the same author, Mr. Justice Holmes and the Supreme Court (Cambridge, 1939), pages 1 to 9.

led them habitually to consider more definitely and explicitly the social advantage on which the rule they laid down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions." (See also Holmes, "The Common Law" (Boston, 1881), pages 35, 36.)

Concerning the approach of Justice Holmes' great colleague, Justice Brandeis, to constitutional questions, a qualified observer has said:

"Note how carefully the latter's opinions sustaining the constitutionality of some new piece of legislation are as a rule documented so as to show the need or desirability of the legislation in question. (Cook, *Oliver Wendell Holmes: Scientist*, 21 A.B.A. Journal 211, 212 (1935).)"[29]

We wish respectfully to note the fact that the number of people, and the territorial areas affected by the decisions in the present cases, give an importance to their social consequences which is unusual even in cases brought to this Court involving constitutional questions.

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[29]See also quotations from Woodrow Wilson and Mr. Justice Frankfurter, page 70, *infra*. Further on Justice Brandeis' views on constitutional interpretation, see his dissent in *Olmstead v. United States*, 277 U.S. 438, 471 *et seq.*, 72 L. ed. 944.

That the effect and tendency of a particular rule are relevant factors to be considered in determining its validity is familiar doctrine, by no means confined to American jurisprudence nor to constitutional law. In *Priestley v. Fowler*, 3 M. & W. 1, 5, 150 Eng. Rep. 1030 (Exch. 1837), Lord Abinger says: "It is admitted that there is no precedent for the present action * * *. We are therefore at liberty to decide the question upon general principles, and in doing so, we are at liberty to look at the consequences of a decision the one way or the other."

Social Aspects, and Diffusion, of the Community Property System.

We have endeavored to show that the community property system is not, as some Congressmen and an occasional law review or text writer supposes, an alien product, not fully comprehensible and somewhat sinister. It is in fact the most widely accepted marital property system in the world (Lobingier, *History of Conjugal Partnership*, 63 Amer. Law Review 250, 280 (1929)).[30]

The nine American states in which the system prevails comprise 34.5% of the territorial area of continental United States, excluding Alaska. In 1940, their inhabitants numbered 21,424,915, or 16.3% of the population of the United States (U.S. Dept. of Commerce, Sixteenth Census of the United States, Population, Volume I, page 14). Living within that area are some 16.6%

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[30]According to Aubéry, writing in 1911 (pages 385 to 462, *op. cit.*, Note 7, *supra*), the community system was at that time recognized, wholly or partially, either as of right or as a matter of convention in the following countries besides France and parts of the United States: Holland, Belgium, Germany, Switzerland, Italy (limited to acquests), Austria, Spain, Portugal, Denmark, Sweden, Norway, Monaco, Latin America and parts of Canada.

A writer under the heading "Community Property and Federal Taxes," in 444 C.C.H. Standard Federal Tax Service, ¶8889, says:

> "* * * But the [community] system has its roots in more ancient lineage than the common law. It was the development of a democratic process wherein women ceased to be in the category of chattels but were given equal rights in property with their husbands. It was firmly established in eight of our American States long before the advent of income and inheritance taxes. Forms of community property may be found in Scotland, parts of Scandinavia, Switzerland, and the Netherlands. It is present in the Philippines, Puerto Rico, Cuba, France, Quebec, Mexico, Spain, the Virgin Islands, and the Spanish-American republics of Central and South America. It is also found in the Union of South America (and its mandated territories) and in Southern Rhodesia."

(5,029,842) of the married men and 16.6% (4,995,584) of the married women, in the United States (U.S. Dept. of Commerce, Sixteenth Census of the United States, *supra*, Volume IV, Part 1, page 160).[31] The above does not take into account Hawaii, with 423,330 inhabitants (1940 census), nor Puerto Rico, which has the Spanish community property system. (*Estatutos Revisados y Codigos de Puerto Rico* (1941), Articulo 1295, *et seq.*)

The wide diffusion and acceptance of the community property system are due, we believe, to the fact that the experience of centuries has proved it to be a just system, responsive to social needs.

The historian Sir William Holdsworth, steeped in the learning and traditions of the common law, has this to say regarding the failure of the community property system to gain acceptance in England:

> "* * * Following the line of least resistance, the law rejected all idea of a community of property between husband and wife, and lost thereby the opportunities for development which are afforded by a system which recognizes such community." (*A History of English Law*, Sixth Ed., Rev., Volume 3, page 532.)

Of the community of acquests, the distinguished Spanish writer and teacher, Felipe Sanchez Roman, in his *Derecho*

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[31]We draw no inference from the fact that the community states have relatively something more than the average number of married persons. Whatever the significance of this fact, it indicates that the community system has not proved a deterrent to marriage—an institution which even the common law regards as worthy of being encouraged. *Re Liberman's Will*, 279 N.Y. 458, 18 N.E. (2d) 658, 122 A.L.R. 1 (1939); *Re Dettmer*, 176 Misc. 512, 27 N.Y.S. (2d) 609 (Surr., 1941), aff'd (mem.) 262 App. Div. 1032, 30 N.Y.S. (2d) 333, aff'd (mem.) 289 N.Y. 597, 43 N.E. (2d) 830, (1942).

Civil Español, 2d ed. (Madrid, 1912), Volume V, page 547, says:

"It conforms with the *unity* of marriage, and at the same time with the individual right and liberty of each spouse; it presupposes respect for individual purposes and possessions, recognizing in the new personality engendered by the matrimonial state, *purposes* which are *peculiar* to it, distinct from the former. It proceeds from this idea to derive logically that of the necessity of economic *means,* which are *exclusive* to it, and assigns an individual proprietorship to the matrimonial entity, different from the individual proprietorship of the spouses. It transfers the management of this common patrimony to a single direction, generally that of the husband, not, through this means, omitting to contrive certain guaranties for the condominium which the wife has in the common marital property." (Emphasis the author's. Our translation; for the original, see Appendix, p. 27.)

The noted French scholar Troplong (page 54, *Du Contrat de Mariage,* 3rd ed., Paris, 1857) says (our translation; for the original see Appendix, p. 24):

"Marriage is a society of two persons. What is more natural than to submit to the regime of the society, the goods of which they are proprietors? Does not their common life have as a consequence the joining of their industry, the commingling of personal property, the community of savings, as well as of acquests made in common? * * * The community is well adapted to the nature of marriage; the spouses work in common, blend and mingle their properties, their labors, and provide equally for the education and establishment of their children. It is especially in the poorer class, where ordinarily marriage contracts [settlements] are not made, that the community is appropriate to the situation of the spouses; in this class,

the wife works actively; by her cares and labors, she contributes to the common welfare, or to the support of the family. It is fitting then not to exclude her from profits; it is fitting to interest her in the success of the conjugal union and to admit her to participation in it, in default, at least of other agreements." (¶40, in part. See Appendix, p. 24.)

Aubéry, at page 522, *op. cit.* note 7, *supra,* after pointing out in familiar terms the wife's contribution to the domestic economy, says:

"Is it not equitable, as a return for this active mission, that the wife be admitted to share with her husband the acquests realized during the union?"

And on page 553:

"Judging by efforts of divers legislators, it is clear that humanity marches in the direction of social progress and the amelioration of the condition of women. In our time, in our households, there is less of moral or physical wretchedness [misères] than in the past." (For the original, of which the foregoing is our translation, see Appendix page 13.)

The same idea is expressed by a leading woman lawyer from a non-community state:

"The momentum of modern life flows in the direction of woman's progress. Any law that retards woman's advance would be fraught with grave social and political implications." (B. Fain Tucker, President, Women's Bar Association of Illinois, Women Lawyers' Journal, April, 1942.)

We quote from a journal of liberal opinion:

"The whole trend of modern law and progressive custom is to regard the wife as an individual, personally and economically." (New Republic, July 14, 1941, page 30.)

And from a commentator on the social sciences:

> "The idea behind the community property system is on the whole a sound one, apart perhaps from the almost exclusive powers of management given to the husband. It recognizes by law the equality between the spouses in regard to property acquired during the marriage by the joint efforts of the parties. * * * The community idea is in harmony with the present American conception of marriage, whereby the relation between the spouses is regarded as a partnership, to which both contribute." (Jacobs, *Marital Property,* Encyclopaedia of the Social Sciences, Volume 10, pages 121, 122.)

Prophetically, the biographer and moralist Plutarch, writing in the first Christian century, expresses with antique metaphor the underlying philosophy of community property:

> "In the union of the two sexes, each furnishes equally to nature the principles which she fuses and blends together, and the result being common to the two, neither can know or discern what is his and what is the other's. This same principle should govern in marriage with respect to property. It is proper that husband and wife place in common ownership without distinction all that they possess, and that there be nothing belonging in particular to either." (Plutarch, *Préceptes sur le Mariage,* quoted at page 28, Aubéry, *op. cit.,* Note 7, *supra;* our translation. For the French translation, see Aubéry, Appendix, page 9).

Five centuries before Plutarch, the Greek historian of antiquity, recording myths which today seem curious, strikes a modern note. He finds it worthy of remark that among a now forgotten people who venerated justice, the women had equal authority with the men. (Herodotus, Book IV, Melpomene, page 212; Rawlinson's Translation, New York, 1928.)

Economic Origin of the Community Property System.

The community property system is economic in its origin, based upon the social necessity of protecting the wife.[32]

A present-day writer states the case in these terms (de Funiak, Principles of Community Property, Volume 1, Section 11, page 27):

> "The most logical explanation, that most largely borne out by the facts, is that the causes which make the wife the partner of the husband are economic in nature. It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere 'adornment' of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggles. Thus, it may be noticed that among some migratory and nomadic peoples, which lead a hard and dangerous existence, the wife shared with her husband its dangers and

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[32]A subsidiary motive may have been to stimulate the wife to industry and economy in the acquisition and preservation of the common heritage. Says the French *légiste* Troplong: "In the countries of the customs, it was the community which was dear to the populations, and this regime was so conformed to national usages, and habitudes, that it was the legal regime of those who married without special agreements. 'Our ancestors,' says Coquille [jurisconsulte, 1523-1603] 'have ~~by custom introduced~~ the community in movables and acquisitions between married people, and it is possible that this has been in order to render the wives more careful to conserve the property of the household, when they knew they had part and profit in it, and finally, that as their souls and bodies are conjoined in excellent union, so their goods are united'."

To these quaintly expressed sentiments of the writer of the 16th, the writer of the 19th century quaintly adds his own approval: "I love this language, I love the ideas which it expresses: this philosophy of equality between the spouses seems to me a great progress." (Our translation; for the original see Appendix, p. 23.)

vicissitudes, she was fully cognizant of the details of and shared in his daily life and labor, she lingered on the edge of the battlefields to succor him from or to help him to despoil his enemies, she was side by side with him on dangerous migrations, and took equal part in his councils; among such races the wife was fully recognized as an equal partner. Such a race was that of the Visigoths and indeed most of the Germanic tribes, including the Angles and Saxons, among all of whom the community system was to be found in varying forms. These Germanic tribes did not have a complex form of society, with gradation of classes and its accompanying privileged or landed aristocracy. Their society was essentially democratic in nature."

In Brissaud, *A History of French Private Law,* page 817, we find this statement:

"The causes which made the wife the partner of the husband are of an economical nature rather than of a moral nature; we can hardly find them in the Christian sentiments of the Middle Ages. * * * In towns, where family possessions are rarely met with, there is nothing to offer an obstacle to its [community's] adoption; the marriage portion of the wife consists in the making of an investment, as would the share of a partner; the benefits resulting from commerce and industry, or acquests which are realized because of them, are shared, because the woman, owing to her fortune or her activity, contributes to their production. Community is thus the matrimonial system of the merchants. In the country the land does not belong to the peasant, but to the lord; the possessions of people of small power are reduced to movables, which, because of their very nature, are hardly to be distinguished from one another; they were declared to be common to the two spouses. The

community is thus the system of the serfs and the commoners. It was more difficult for it to obtain a hold in the class of the nobility; the share brought by the wife was there, in fact, ordinarily very small (unless she were the heiress of a fief); she would be contented with her dower. * * *"

In Huebner's *History of Germanic Private Law,* page 630, the author points out that in Northern Germany the old idea of family-property ("Familienvermögen") remained vital among large masses of the rural population, tending to prevent the union of the property, particularly lands, which daughters took with them into the marriage, and that such family lands, in the event of the daughter's death without children, reverted to her family. Continuing, the author says, page 631:

"* * * It was because of this conservative attitude of mind that no necessity was felt, under the legal systems now in question, of giving the wife rights in her husband's property.

"On the other hand, in those regions and among those classes of the population where the chief part of the marital property did not consist of landed possessions inherited through generations, but of acquests, a tendency prevailed to develop an intimate fusion of the property of the two parties into a more or less comprehensive community of goods. Already in the Frankish period the acquests had caused the abandonment, in some legal systems, of the system of separate estates. That they played such a part can be readily understood. For 'where the property is constituted, changed, and enlarged, by the activity and labor of the parties, the fusion of the wife's property with the estate of her husband is materially facilitated.' [Heusler, 'Institutionen', II, 304.]"

The Community System Is Appropriate to a Democratic Society.

Not only is the community system economic in origin; it is the system appropriate to a democratic society such as our own, or that of our Anglo-Saxon ancestors (see *de Funiak*, page 55, *supra*).

Aubéry says of a society in which community was conspicuously absent:

> "The absence of community of goods in England appears to have a cause of political order. It is probably a consequence of the institution of territorial aristocracy. The effort has been to concentrate the great fortunes and prevent their breaking up." (Our translation. For the original, see Appendix, p. 11.)

The English historians Pollock and Maitland confirm this. See excerpt quoted page 11, *supra*, from their History of English Law, 2d ed., Vol. 2, page 402.

Origins of the Common Law System.

The English system based upon "the law for the great," to which Congress now says all the states of the Union must turn or suffer an unequal burden of taxation, is feudal in origin (Pollock & Maitland, Volume 2, page 419; Buckstaff, *op. cit., supra*, page 12), growing out of the assumed necessity of the maintenance of a landed aristocracy and the perpetuation of great fortunes. The particular institution, that of dower, which the common law offered in place of community rights, was a privilege grudgingly allowed by international brigands to the daughters of a conquered people. The distinguished French historian Aubéry (*op. cit., supra*, note 7) makes clear the origin of the vaunted common law system of marital property rights. After stating that in Normandy not only was

the community system of common right non-existent, but community by agreement was actually prohibited, he continues:

> "Such a singularity is explained by considerations drawn from the organization of the family in the province of Normandy. The wife had there a very humble status, the husband extended powers. The Normans, who joined a proverbial avarice to an insatiable cupidity, not having been able to link with their fortunes across the seas the women of their country of origin, united with those of the region they had conquered. These former pirates showed little regard for their wives, considering them as strangers, inferior persons." (Our translation of a portion of excerpt quoted in Appendix, p. 10.)

Continuing, he quotes an earlier writer, Marcadé:

> "Ferocious soldiers, avid conquerors, the first Normans, in seizing Neustria and taking the women of the vanquished, following the example of the first Romans, must have seen in their marriage a relationship of master and slave rather than an association giving common rights to the persons concerned."

The Normans, carrying their system of family laws to England with William the Conqueror in 1066, made impossible the adoption of the community system in that country, thereby depriving the Anglo-Saxon race of an ancient heritage. We proceed to the documentation of this statement, which has a definite relevance to the issue now before the Court.

Neither of the standard English historical texts is very definite upon the effect of the Norman conquest respecting the law of marital property. Holdsworth (*op. cit.* note

10, *supra*) says, Volume 1, page 29, that "The conquest was disastrous in its results to the poorer classes."[33]

Pollock and Maitland, 2d ed., Volume I, page 79, say: "The Norman Conquest is a catastrophe which determined the whole future history of English law."

From another source we obtain an idea as to the extent of the catastrophe of which the historians speak. Florence G. Buckstaff, at page 241 *et seq.* of the monograph referred to page 12, *supra,* deals with the law relating to marital property during the period from the reign of Aethelbert (after the coming of Augustine[33.1] into England (A.D. 597)) to the Norman Conquest. On page 245 the author says,

> "Community of property.—When there were children of a marriage the morning-gift was superseded, as in Westphalia, by an equal share of the family property. * * *."[34]

Discussing the rights of married women during the Anglo-Norman period, the author says, page 250,

> "We have seen the general position of Anglo-Saxon women; *that they were equal partners in marriage,* and as widows were independent citizens." (Emphasis supplied.)

Page 251:

> "If now we pass over the first century after the Norman Conquest and inquire what the property rights of women were in the reign of Henry II. (1154-89), we shall find that a great change has come

[33]On the effect generally of the Norman conquest, see Volume 1, page 24 *et seq.*; see also Volume 2, page 12.

[33.1]Or Austin; first Archbishop of Canterbury.

[34]In a footnote, page 245, the author quotes from Young, "Essays in Anglo-Saxon Law," edited by Henry Adams, page 134: "The legal dower of Anglo-Saxon law included half the husband's property, real and personal."

about. We are fortunately able to determine exactly the legal position of women at the later time. We have a description of the laws and customs of England (*Tractatus de legibus et consuetudinibus regni Angliae*) which is ascribed to Ranulf Glanvill, the great lawyer and justiciar of the latter part of Henry the Second's reign. We will first ascertain the property rights of married women according to Glanvill, and then work back into the years between Glanvill and the conquest with a view to tracing the origin of the vast change we shall find. If we succeed in any degree in accounting for the state of things described in Glanvill, we shall also account for the origin of the disabilities of women in the later Common Law of England, for the rules laid down by Glanvill continued in force, with few modifications, until our own day.

"The community of property known to the Anglo-Saxons has disappeared in Glanvill's day and the morning-gift or *dos ad ostium ecclesiae,* the dower of common law, has taken its place. * * * The widow's share, then, was the dower of one-third the real estate of which her husband was seized at the time of the marriage and one-third of his personal property in addition. The dower interest was only for life, and was restricted to a third of what her husband possessed when she married him, no matter how much he had acquired afterward."

Page 256:

"We cannot tell precisely when the old customs came to an end and the new ones took their place. The modification must have been a gradual one, extending over all the years from William the Conqueror to Glanvill. There were struggles on the part of the Anglo-Saxons to keep their ancient ways; and they met with a promise of success from Henry I.; but as the military tenure of land increased, the

powers and rights of women diminished. They could not perform military service. The feudal lord received great profits from his wards and it was to his interest that the children should have a larger share of a man's property than a widow. Again, the husband often had to perform feudal services for *maritagium* of his wife; hence he had certain rights in the *maritagium*. In such ways the feudal system tended to curtail the property rights of married women and widows. Whether the same results would have come about as a result of indigenous feudal tendencies had the Norman Conquest never taken place, may be doubted. That some of the provisions found in Glanvill were of Norman origin seems to me extremely probable."

After summarizing the rights of women under the law of Normandy as set forth in the *Tres-ancien Coutumier* (about 1200 A.D.), the author says, page 258:

"When we compare the provisions in Glanvill on dower and so forth with the *Tres-ancien Coutumier*, we find them sufficiently similar to warrant the inference *that it was largely Norman influence which brought about the change from Anglo-Saxon law of communtiy of property to the common law of dower.*" (Emphasis supplied.)

Page 259:

"The Norman customs of dower probably became somewhat general in England in the middle of the 12th century, but, as Digby says, in the county courts and courts of the lords of manors the variety of customs was so great that Glanvill declined to attempt a statement of them. * * *"

On page 263 the author says:

"It is perhaps not strange that the 12th century principles should have lasted in England until the

19th, but it seems strange that the Americans, who laid aside many of the feudal customs, including primogeniture, as mediaeval provisions out of place in a republic, should have kept the provisions of the Common Law regarding women apparently without question."

Through the researches of the French and the American scholar, confirmed in their general points of view by the leading English historians in so far as they deal with this subject matter, we are enabled to trace the decline and extinction of the Anglo-Saxon community laws or customs, and their replacement by an imported system, an "alien intruder,"[34.1] sponsored by "nobles" and based upon "the law for the great." Looking backward some eleven hundred years, we trace the origins of the common law system to the fact that Scandinavian pirates, descending on the coasts of France, adapted to their use a code of marital property laws deemed appropriate to the daughters of the vanquished.[35] Through the conquest of England two hundred years later, the Normans imposed this law and their own particular concepts of what is appropriate for a feudal society upon the great English people. Now, by ironic coincidence, when the people that walked in the darkness of tyranny have seen the great light of liberty, this Court is asked to fasten upon the people of the United States a system of marital property rights originating in the low regard of the conqueror for the conquered, in its essence, as the French historian says, upon the relationship of master and slave.

[34.1] *Cf.* Paul, Federal Estate and Gift Taxation, Section 1.09, referred to page 6, *supra.*

[35] It seems probable that Scandinavian women were the beneficiaries even then of a form of community. See Pollock & Maitland, Vol. II, page 402, quoted in Appendix, page 19.

Present Status of Women Under Common Law Systems.

We concede that the old laws have been relaxed. Marriage is no longer legalized brigandage; it no longer robs a woman of property she already owns, as in good King George's glorious days. Women are no longer subject to all the disabilities they suffered at common law. Minor benefits—homestead, exempt property, widow's allowance—have been granted to them both in non-community and in community states (3 Vernier, *American Family Laws,* Section 228). Dower they retain in no community property state, but in some form, in twenty-four others (Vernier, Section 189). Regarding this venerable institution the competent scholar just mentioned, commenting on well-meant efforts at improvement in it, says (*op. cit.,* Section 188):

> "The most pronounced reaction of the writer after having examined the statutes in this field is a feeling of disgust for the slipshod methods of lawmakers. * * * The statutes are filled with ancient matter which, coupled with piecemeal innovations, forms an inconsistent, ambiguous hodge-podge. In no field is there more evidence of haphazard, fragmentary legislation; and, in most jurisdictions, no field is more deserving of a complete renovation."

And again (Section 188):

> "It [dower] is no longer applicable to modern property conditions or to the present status of husband and wife; and the widespread statutory changes evidence the fact that legislatures have recognized its inappropriateness. The mistake of the majority of jurisdictions has been the building of new statutory schemes upon the foundation of dower."

Some thirty-three states have purported to give the wife "dower," that is, a statutory share, in the husband's personal property (Vernier, *op. cit.*, Section 189) including, it is assumed, property acquired during the marriage, all the latter being attributed to the husband. To protect these minimum and varying rights, grudgingly conceded, a wife is given—not ownership, or the power of disposal at her own death, as in the community property states—but the power to elect against her husband's will if he fails to accord to her the minimum which the law says he must give her.

What is this statutory amelioration of the common law, so tardy in appearance, worth? Very little, we submit. From a cloud of witnesses we summon the highest courts of three states, each among the first in population and wealth, each renowned as the seat of a mature and a progressive civilization—typical, therefore, of the best the common law has to offer.[36] First, the Supreme Judicial Court of Massachusetts:

> "In this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions, G.L. (Ter. ed.) c. 190, Secs. 1, 2, under his will or by virtue of a waiver of his will. That is true even though his sole purpose was to disinherit her." (*Kerwin v. Donaghy*, ... Mass. ...., 59 N.E. 2d 299, 306 (1945).)

Next, the Supreme Court of Pennsylvania:

> "It is the settled law of this state that a man may do what he pleases with his personal estate during his

[36]In fact, it appears from Vernier, Section 188, page 348, that the New York law on this subject constitutes one of the best of the statutory revisions.

life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies, and then only, do the rights of his wife attach to his personal estate." (*Lines v. Lines,* 142 Pa. 149, 165, 21 A. 809, quoted with approval in *Beirne v. Continental Equitable Title & Trust Co.,* 307 Pa. 570, 161 A. 721 (1932).[37]

Finally, the New York Court of Appeals:

"Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory."

Further, quoting from a Pennsylvania case:

" 'The "good faith" required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property. It is, therefore, apparent that the fraudulent intent which will defeat a gift inter vivos can-

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[37]See also *Benkart v. Commonwealth Trust Co.,* 269 Pa. 257, 259, 112 A. 62 (1920), "It is the settled law of this State, as was the common law, that during his life a man may dispose of his personal estate by voluntary gift or otherwise as he pleases, and it is not a fraud upon the rights of his widow or children [citing authorities]. This power arises from the fact that he is the absolute owner, and hence may make a gift, declare a trust, or otherwise dispose of his personal property at his pleasure. During his life his wife and children have no vested interest in his personal estate, and hence they cannot complain of any disposition he sees fit to make of it. Their right to his property attaches only at his death. * * * If the gift is absolute and accompanied by a transfer of possession with intent to divest the donor of his ownership, although the obvious effect is to defeat the wife's or children's succession to the property at the donor's death, it is not fraudulent and therefore invalid."

The rule of the *Benkart* case is referred to with approval by the New York Court of Appeals in *Krause v. Krause,* 285 N.Y. 27, 32, 32 N.E. 2d 779, 780 (1941).

not be predicated of the husband's intent to deprive the wife of her distributive * * * share as widow.'" (*Newman v. Dore,* 275 N.Y. 371, 379, 9 N.E. 2d 966, 112 A.L.R. 643 (1937).)

Referring to the feebly forcible efforts to protect the wife's interests reflected in the statutes giving "dower" rights in personalty, Vernier (*op. cit.,* Section 189), after a survey of the field, says:

"It will be observed that, in general, the wife has no protected inchoate interest in the husband's personal property similar to her inchoate dower in his lands. She shares only in such property as he may die owning."

The community property states do not favor the view that a man "may beggar * * * his family," by gifts of marital property inter vivos, to strangers, or to anyone. Beside the "modern" common law rule enunciated by the courts of three leading states, we venture to place the community property rule, as stated in a California case:

"The gift of community property by the husband without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband * * *, and after his death may be set [aside] as to one-half thereof * * *." (*Ballinger v. Ballinger,* 9 Cal. 2d 330, 334, 70 P. 2d 629 1937).)

And as stated in a Washington case (referred to and quoted, in part, page 18, *supra*):

"Now, a wife's rights in family personalty are not of the contingent sort, like dower or survivorship, but a present estate. True, by our statute the husband is made manager, with full power to sell and dispose of this. But it does not follow that he can give it away. He is, so to speak, only the head of a

firm. The personal property is just as much hers as his. * * * Under our law she has helped to create it as much as he. Consequently the idea is not to be tolerated that a husband can give a mistress stocks or bonds or precious stones out of the family money." (*Marston v. Rue,* 92 Wash. 129, 159 P. 111.)

The Washington court in *Occidental Life v. Powers,* 192 Wash. 475, 75 P. 2d 27, 114 A.L.R. 531, after referring to earlier Washington cases including *Marston v. Rue,* says:

"The substance of these decisions is: * * * that a husband does not have the power to make substantial gifts of community personal property without the consent of his wife.[38]

The plain fact is that except for the wife's retention of ownership of her own separate property—a point we are not concerned with here—the common law states are

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[38]A rule somewhat more lenient than that announced in the above cited California and Washington cases apparently prevails in some community property states, in respect of gifts by the husband. See de Funiak, Section 122, stating that "moderate gifts of the community property where there is no intent to injure or defraud the wife and the amounts of the gifts are not unreasonable in any way so as to be in prejudice of her rights" are allowed in some states. Obviously this stops far short of the common law rule under which the husband can "beggar" his family or give away marital property, without limit, for the very purpose of depriving the wife of her right of inheritance. It is doubtful whether the rule stated goes far beyond the *de minimis* exception recognized by the Washington Court in *Marston v. Rue, supra.*

Regarding de Funiak, the caveat should be noted that the Louisiana cases cited by him in Section 122 (see particularly *Thompson v. Societe Catholique,* 157 La. 875, 103 So. 247 (1925)), antedate the 1926 amendment to Section 2404 of the Civil Code, adding the significant clause: "A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor."

still living in pre-Revolutionary times in so far as property acquired by the joint labor and sacrifice of the spouses is concerned. Whatever its statutory ameliorations, the common law still treats the wife as an inferior, not as a partner or a contributor of services having economic worth. Observing the discrimination to which the common law still subjects women; the economic insecurity with which it still holds them in bondage; the right of disposition of property acquired through common enterprise which it parsimoniously withholds—we may paraphrase, but with irony, the observation already quoted (p. 9, *supra*) of a learned commentator whose admiration seems to have been easily evoked: "So great a favorite is the female sex of the laws" of the United States!

The Alternatives Presented.

Fundamentally, the question is whether the law of the Normans shall prevail. To their avarice and cupidity, of which the French historian speaks (*supra,* p. 58), and to which the common law states are indebted for their system of marital property rights, Congress has given countenance and authority in certifying as the preferable, indeed as the exclusive system, that one which says in effect that all property acquired after marriage is acquired by the husband "through his own efforts," and "is regarded as belonging entirely to the husband." In effect, Congress has said that as to marital property acquired through their labor and sacrifice, women have, and can be given, no rights which the laws of the United States are bound to respect, thus giving practical application as a principle to a statement made by this Court as a matter of historic fact, affecting other members of the human race; likewise the objects of immemorial injustice (*Dred Scott v. Sandford,* 19 How. 393, 407, 15 L. ed. 691).

The present cases present on the one side the property system favored by moralists and sages, a heritage of the great free peoples, other than Britons, who were deprived of it through no fault of their own; on the other, that inherited from Scandinavian brigands, sanctified by custom until its crudities have become obscure. This Court now has the opportunity to say whether the older and more civilized institution can continue to exist in competition with a system based on the primitive common law concept that women are inferior beings, entitled only to a subordinate place in the social order.[38.1] At the risk of repetition, we say that Congress has in terms approved this concept when it says that the wife is treated in community property states *as if* she were a part owner, by this derogatory term necessarily implying that the attribution of ownership to the wife must rest on courtesy or fiction, not on the economic worth or value of her contribution.

Without disparagement of this Court's record in any period of history, it may be said of its decisions in recent years that they uphold liberty, and that they are consistent with the ideal of social progress. Complete documentation of this statement would lead too far afield, but we glance in passing at this luminous record,[39] of which

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[38.1] Compare the following statement by a French commentator concerning a marital property regime fully as favorable to women as the common law system: "The above, then, are the merits of the dotal regime according to the views of its defenders. Superiority of man, inferiority of woman, a conserving protection given to her weakness, all the philosophy of this regime is in these three ideas." (Troplong, *op. cit., supra,* Appendix page 23.)

[39] *Social legislation: West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L. ed. 703 (1937).

Civil rights: Ex parte Endo, 323 U.S. 283, 89 L. ed. Adv. Ops. 219 (1944).

Religious freedom: Follett v. *McCormick,* 321 U.S. 573, 88 L. ed. 938 (1944; municipal ordinance held invalid); *Jamison*

the history of free institutions reveals no parallel in a comparable period of time. These decisions recognize that "constitutions are vehicles of life."[40] The tendency, nascent in 1916, which a present Justice of this Court then noted, to place emphasis in dealing with legislation affecting industry, upon "the affirmative enhancement of the

v. Texas, 318 U.S. 413, 87 L. ed. 869 (1943; similar); *Largent v. Texas,* 318 U.S. 418, 87 L. ed. 873 (1943; similar); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 87 L. ed. 1628 (1943; ordinance of Board of Education, enacted pursuant to state statute held invalid); *Cantwell v. Connecticut,* 310 U.S. 296, 84 L. ed. 1213 (1940; Connecticut statute held invalid).

Free Speech: Taylor v. Mississippi, 319 U.S. 583, 87 L. ed. 1600 (1943; Mississippi statute directed against alleged subversive doctrines held invalid); *Herndon v. Lowry,* 301 U.S. 242, 81 L. ed. 1066 (1937; Georgia statute held invalid); *De Jonge v. Oregon,* 299 U.S. 353, 81 L. ed. 278 (1937; Oregon statute held invalid); *Stromberg v. California,* 283 U.S. 359, 75 L. ed. 1117 (1931; California statute held invalid); *Thomas v. Collins,* 89 L. ed. Adv. Ops. 340 (1945; Texas statute held invalid); *Thornhill v. Alabama,* 310 U.S. 88, 84 L. ed. 1093 (1940; picketing case; Alabama statute held invalid); *Carlson v. California,* 310 U.S. 106, 84 L. ed. 1104 (1940; county ordinance against picketing held invalid); *American Federation of Labor v. Swing,* 312 U.S. 321, 85 L. ed. 855 (1941; common law policy of Illinois against picketing); *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 83 L. ed. 1423 (1939; municipal ordinance interfering with free speech and lawful assembly).

Free Press: Lovell v. City of Griffin, 303 U.S. 444, 82 L. ed. 949 (1938; handbills; city ordinance held invalid); *Schneider v. Town of Irvington,* 308 U.S. 147, 84 L. ed. 155 (1939; similar); *Bridges v. California and Times-Mirror Co. v. Superior Court,* 314 U.S. 252, 86 L. ed. 192 (1941); *Grosjean v. American Press Co.,* 297 U.S. 233, 80 L. ed. 660 (1936; Louisiana statute taxing advertising in certain publications held invalid).

Right to fair trial: Powell v. Alabama, 287 U.S. 45, 77 L. ed. 158 (1932); *White v. Texas,* 310 U.S. 530, 83 L. ed. 1342 (1940); *Brown v. Mississippi,* 297 U.S. 278, 80 L. ed. 682 (1936); *Smith v. O'Grady,* 312 U.S. 329, 85 L. ed. 859 (1941); *Ashcraft v. Tennessee,* 322 U.S. 143, 88 L. ed. 1192 (1944); *Rice v. Olson,* 89 L. ed. Adv. Ops. 903 (1945); *Williams v. Kaiser,* 89 L. ed. Adv. Ops. 362 (1945).

[40] Woodrow Wilson, The Law and the Facts, 5 Am. Pol. Sc. Rev. 1, at 10 (1911).

human values of the whole community,"[41] has been extended to infuse new vigor and authority into constitutional guaranties, particularly those having to do with individual liberty. In so doing, this Court, firm in according respect to legislative enactments, has nevertheless, in numerous cases, freely employed its constitutional prerogative to declare invalid legislation found not to be in conformity with the supreme law. Whatever affects the rights of the states to regulate their internal economy affects the individual citizen as directly as did the laws justly complained of in the cases to which we have referred.[42]

Consistent with the idea of liberty is the community concept that the condition of equality into which the Declaration of Independence says all men are born, applies both to men and women. Neither equality nor freedom can exist where there is economic servitude; they cannot exist where property acquired through the joint efforts of spouses "is regarded as belonging entirely to the husband" (House Committee Report, *supra,* p. 5); nor where the tax laws discriminate between the spouses.

At a time when, not only in the homes of the nation, but in its factories and even in its services auxiliary to the military and naval power, women have been and are doing their full share to keep the world a decent place for civilized men to live in, an attempt by Congress, invading state authority, to say that no state can confer property rights on women which Congress is bound to

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[41]Mr. Justice Frankfurter, Hours of Labor and Realism in Constitutional Law, 29 Harv. L.R. 353 (1916).

[42]See cases cited, Note 39.

respect, seems particularly lacking in grace and timeliness. This Court, we respectfully submit, has bound itself by no precedents which might prove embarrassing to it in reaching a result consonant with the ideal of social justice—in fact, as we have pointed out (see p. 18, *supra*), the Court's own decisions fully recognize every principle which the community property states need to establish in order to prevail.[49]

That the Court is given the opportunity by its decision to uphold an enlightened and progressive standard constitutes, we believe, no source of embarrassment to the cause of the community property states if, as so often occurs, the question becomes, in the Court's opinion, one where a line must be drawn (*Harrison v. Schaffner,* 312 U.S. 579, 85 L. ed. 1055 (1941); *Irwin v. Gavit,* 268 U.S. 161, 168, 69 L. ed. 897 (1925)).

Conclusion.

In conclusion, we revert to the Congressional concept mentioned at the beginning (p. 5, *supra*), to the effect that in non-community-property states, property acquired by the husband after marriage "through his own efforts" is regarded as belonging to the husband. Translated, this means that the husband is the beneficiary of his wife's "efforts" as well as of his own. Manifestly, such a system has its advantages—to the male population. Since

[49]There is no "long period of accommodations to an older decision," requiring the Court "to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." *Helvering v. Griffiths,* 318 U.S. 371, 87 L. ed. 843 (1943); *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 86 L. ed. 100 (1941).

the converts to the community property system have been few, it seems that those advantages are deemed to outweigh certain differences between community and non-community states in respect of taxation. All the states can obtain the advantages, if any, of the community property system by adopting it.[44] The remedy is in their own hands, and the price is willingness to forego the advantages which the common law gives the sex which, if allowance is made for obstinate self-deception, is master only when its opinions are concurred in, and obeying, be-believes that it commands.[45] In the absence of willingness to pay that price, it comes with ill grace for the non-community states, the majority, through their lawmaking power, to enact legislation impairing the operation of the older and more equitable system.

If Congress can validly enact such legislation, a long step has been taken toward obliteration of the autonomy of the states, and toward Congressional control over their institutions, customs, laws. In passing a measure having

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[44]The writer of the note in 58 Harvard Law Review 742 (May, 1945), to which we have referred (see p. 6, *supra*), recognizing the heavier tax burden on the community under certain conditions, naively suggests that the community property states may achieve tax equality by going over to the common law system. Such a suggestion, proceeding from so respectable a source, emphasizes the social and economic importance of the problem now presented to the Court. Is it not clear that an act of Congress which compels a state to modify its system of property rights in order to escape an unequal tax burden is an interference with that system?

The further statement in the same note that "the wife's interest in property held in a community property regime differs little from her interest in her husband's property at common law," betrays a fundamental misconception of community property.

[45]See *passim*, Aubéry, *op. cit.*, note 7, *supra*, at page 506, quoted Appendix, page 11.

such an effect and tendency, Congress, we submit, has misconceived and exceeeded its authority.

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APPENDIX—List of Authors quoted, in order in which they appear:

APPENDIX.

Huebner, *A History of Germanic Private Law,* Little, Brown and Company (1918), pages 626 and 627:

"*Legal Relations during the Existence of Marriage.* (1) *The ordinary form* of the marital community of property in the folk-laws was that the ownership of the wife's estate, constituted of the portions above indicated, was not in the husband, but in the wife. The husband, however, by virtue of his mundium, held possession of all the wife's property: as a result of the marriage the property of the bride was delivered to him, and he likewise held in his own hand his gifts to the bride. In this manner, the distinct ownership of the property being preserved, but the entire marital estate united in the possession of the husband, the result was that as early as in the folk-laws the original undivided property had been replaced, in the main, by a system of community property. * * *"

After pointing out that, under the earlier law, the husband having received the seisin of the wife's estate, received with it on the one hand the right to take the profits and on the other hand the duty of administration, holding the wife's property as mundium-holder or guardian ('Vormund'), and that the husband could alienate the wife's chattels, while the wife on the other hand could not dispose of anything *inter vivos* with the exception of the paraphernalia, the author goes on to say:

"(2) Some of the legal systems of the Frankish period had already departed from this principle of distinct estates to the extent of recognizing a true legal community as respects so-called *acquests* ('Errungenschaften'),—that is, such property as was acquired by the spouses during marriage, by labor or by juristic act, for value; an idea

also reflected in the dower, which consisted of a fraction of the husband's property. * * *"

In the excerpt first quoted above is a reference to the time of the *folk-laws*. Huebner seems to be not very specific as to what this time was. On page 5 he states that in the earliest times law rested, among the Germanic peoples as elsewhere, upon custom, and that if in primitive times any public statutes were enacted, such instances must have been rare. He continues, pages 5 and 6:

"* * * After the migrations of the Germanic tribes, it is true, the different Germanic racial branches made comprehensive records of their law. But these so-called folk-laws or 'Leges Barbarorum' were, in their original form, essentially, written formulations of old customary law. * * * Moreover, the folk-laws were never exhaustive legal records; numerous unwritten rules of customary law remained in authority beside them. Even the Frankish capitularies did not sweep aside the customary law. And for private law the whole legislation of the Frankish period had almost no significance whatever.

"After the disintegration of the Frankish Empire the folk-laws and the capitularies gradually fell into oblivion, until in the 1000s they were completely forgotten. Almost no new statutory law appeared until in the 1200s. * * *"

The Frankish period, mentioned numerous times in Huebner, is from about 500 A.D. to 843. It reached its height under Charlemagne, who was proclaimed Roman emperor in the year 800 and died in 841. In the second excerpt quoted above from page 627, Huebner says that a true legal community had begun to develop during the Frankish period (that is, somewhere between the years 500 and 843).

In the first excerpt quoted above, the term *mundium* is referred to. This is defined on page 619. It seems to come from *Muntherr* and is about the equivalent of *guardian, steward,* or *master*. The subject is also discussed, pages 632 to 634.

On pages 643 and 644 it is stated:

"(2) *The general community of goods.*—As already remarked, many medieval systems of marital property established not simply a limited but a general community of goods. Some of them accomplished this by extending the acquest and chattel community to the entire marital property. This was first done in the Frankish and Westphalian laws, where the requirement that dispositions of land be made by collective hand even under a limited community of goods (*supra*, page 640) had the result of developing a collective ownership of the spouses in those portions, also, of the marital property. In many places, particularly in the cities of Frankish and Bavarian-Austrian territory, statutory recognition of this form of marital estate originated in a custom by which spouses mutually devised their entire property to one another. The general community of goods was first developed in the lowlands of the upper and lower Rhine as far as Holland and Flanders, as well as in Westphalia and Thuringia; from these regions it spread into the lowlands of the Weser, toward Hamburg and Lübeck, Mark Meissen and Mark Brandenburg, Lausitz, Silesia, Prussia, Bohemia, and Moravia. It was also widely prevalent in the regions of the Swabian, Bavarian, and Austrian laws, and was introduced into many cities of Magdeburg law in place of the Saxon paraphernalia. A few legal systems regarded it as arising only when a child was born from the marriage, and as determining upon the death of all children,—

so, for example, the Westphalian-Lübeck law that spread from Soest. This consideration, however, was generally disregarded, following the example of the Frankish law.

"(A) Legal Relations During Marriage.—The general community of goods, in its legal essence, was 'a community in collective hand[a] that fused the entire property of both spouses into one entity, their shares therein being undivided and uncollectible during the continuance of the community.' [*Gierke* in *Holtzendorff-Kohler,* I, 538.] It was distinguished from the limited community of goods by the fact that the community attached by force of law to all property brought into the marriage or later acquired, intimately uniting it in a collective estate belonging equally to both spouses. There existed, therefore, no statutory separate estates; but, on the other hand, there was nothing to prevent the spouses from reserving particular pieces of property, by marriage contract, as separate property. Yet even under this system, which emphasized most decidedly the equality of husband and wife in property rights, the husband was the holder of the mundium and the head of the marital community, and therefore alone entitled to administer and represent it. To be sure, his dispositive power was variously limited in different legal systems. Although he could everywhere dispose independently of the chattels, he was bound in most systems, as regards the lands, to secure the coöperation of his wife; only a few allowed him to act with entire independence as to them also. As for the treatment of obligations, the same principles prevailed as in the case of the limited community of goods. The spouses constituted with respect to the collective property

[a]"Zu gesammter Hand," that is, in joint hands, or common ownership. The German phrase is referred to by Brissaud, page 813. "In collective hand" seems to be an inapt translation.

a community of obligations ('Schuldengemeinschaft'). Obligations binding the collective estate included all obligations assumed by the husband, and such obligations of the wife as were incurred either before her marriage or in transactions within her marital competence. The husband was liable for these obligations of the collective estate with his special estate, also, if such existed; whereas under most legal systems the wife was liable only with the collective property under all circumstances, and could free herself even from this liability, as in the case of a chattel community, by a renunciation made in legal form (above, p. 640)."

On page 647 Huebner traces some of the later developments of the "system of the general community of goods" and shows that it was carried into some of the modern codes, leaving in effect, however, provincial statutes and regulations ("Statuten") which established a general or acquest-community. It is pointed out, however, that other contractual agreements were permitted. The prevalence of this general community of goods is also referred to on page 651.

Brissaud, *A History of French Private Law*, Little, Brown and Company (1912), pages 28 and 29:

"The Middle Ages contrasted *community of possessions* between spouses with the Roman *marriage portion system.* Although under this latter system the wife is no longer subject to the husband's power, still she has absolutely no share in the advantages realized by the husband in the administration of the property forming the marriage portion. The community still places the wife who has her own possessions under the authority of her husband; but the husband cannot have any disposal of the personal belongings or family possessions of his wife;

and, as acquisitions made during the marriage belong to both spouses in common, she receives her share of them when the marriage is dissolved,—a thing which is perfectly equitable when her personal possessions or her labor has contributed, as happens more often than not, to the acquisition of these possessions by the community.

"In England, where the community was never introduced, the evolution of the marriage contract was the same as at Rome. The 'feme covert,' who was absorbed in and annihilated by her husband, resembles the Roman wife 'in manu mariti.' But the civil law was often evaded, and the Law of 1882 (Married Woman's Property Act) sanctioning an emancipation which had already taken place in fact, has given her the free administration and the free disposal of her possessions; she is merely asked to contribute her share to the expenses of the marriage; she is in the same position as a silent partner."

In a note on page 813, the author speaks of

"* * * a Germanic joint ownership, 'zu gesammter Hand'; this not very precise theory would assume that both spouses would have to act 'communi manu'; but as this is only true in exceptional cases, the conception of unity of hands must be brought in ('Einhand'), a thing which overthrows the principle. Cf. the oft-cited passage from *Justus Veracius,* 'Libellus consuet. princip. Bamberg' (1681), 1733, p. 59."

On page 812 the author says:

"The system of common law at the beginning of the feudal period in countries of Customs placed the possessions of the wife under the administration and made them subject to the enjoyment of the husband; one can say that in this sense they were all part of the marriage por-

tion. All the acquests belonged to the husband. The wife, who was strictly subject to the husband's guardianship, only had a right of survivorship (dower, etc.) and the restoration of the share brought by her in immovables, when the marriage came to be dissolved. Under this system, as under that of the community, the possessions of the spouses formed but one mass, which was in the hands of the husband. But it was lacking in the two essential characteristics by which the community system is marked: (a) the transmissibility of the wife's rights to her heirs; by which, if marriage were dissolved by her dying first, her heirs took the share to which she would have had a right if she had survived; (b) during their joint life the spouses are looked upon as joint owners, or as partners with respect to losses and gains."

Note, page 814: "The evolution of the community system is, as we see it, characterized by the affirmation and the more and more energetic protection of the rights of the wife." The author goes on to say, "There are many who interpret it differently," and this idea is developed somewhat at length.

Going back to the origins of community, the author says, page 816:

"* * * It is rarely found mentioned in the twelfth century; the charters of the communes of the North, like that of Laon, 1128, c. 13, speak of a community of acquests between the spouses. In the thirteenth century P. de Fontaines does not seem to make any allusion to it; 'Jostice,' the 'Et. de St. Louis,' the Assizes of Jerusalem, and the Registers of Parliament, are far from being explicit. Beaumanoir is very sparing of details; he, however, affirms in a categorical manner the existence of the conjugal community and presents it as an immemorial

custom, 21, 2: 'Everyone knows that a community is formed by marriage, for as soon as the marriage is performed the property of one and the other becomes common by virtue of the marriage. My views are that the man is a guardian . . ."

Beginning on page 817, the author speaks of the causes which produced the community and directed its evolution, saying that community is the matrimonial system of the merchants (see quotation, page 55, *supra*).

Continuing, page 821, the author says:

"We are led to believe that the community was more frequent originally among the commoners, and that it only became generally accepted among the nobility later on. But we cannot hide from our selves the fact that there is a good deal of uncertainty upon this point. There was no absolute obstacle to the formation of a community among members of the nobility, at least one restricted to movables. The right of survivorship of the Frankish period existed in the case of women of very high rank, as well as women who were free; in various localities it became transformed into a community right. But there are to be found texts from which it clearly follows, or which allow one to assume, that in other localities the wife of the nobleman had no community possessions, and that she was satisfied with her dower and her legal reference-legacy in movables; this is because the old tradition was retained in this matter, as happens often enough in the law of the nobility, the social anatomy of this law being more archaic than that of plebeians; it is also because the exclusion from inheritance, to which all women were formerly subjected, lasted especially in the case of the nobility. Perhaps this peculiarity, better than any other explanation, will account for this remarkable fact:

until 1580 the renunciation of community was only allowed in Paris to a woman of the nobility; in doing this she acted as an heiress rather than as a partner."

Gaëtan Aubéry, *La Communauté de Biens Conjugale,* (Paris, 1911), pages 25 and 26:

"On ne trouve donc dans l'antiquité aucune trace d'une vraie société conjugale de biens gouvernée par le mari. La communauté, qui implique une certaine égalité de droits entre époux, est évidemment incompatible avec la polygamie, quit fait à la femme une situation trés inférieure. * * *"

Page 28:

* * *"Dans le premier siècle qui a suivi la naissance du Christ, paraissent les Préceptes sur le mariage, de Plutarque. Cet ouvrage, véritable trésor de la sagesse antique, élève l'âme et renferme des leçons de haute morale domestique. D'après le célébre moraliste, tout dans le mariage doit être commun, surtout les idées et les principes. 'Dans l'union des deux sexes, dit-il, chacun fournit également à la nature des principes qu'elle mêle et confond ensemble, et, ce qui en résulte étant commun aux deux, nul ne peut connaitre ni discerner ce qui est à lui ou ce qui est à l'autre. Il doit en être de même dans le mariage par rapport aux biens. Il faut que le mari et la femme mettent en commun sans distinction tout ce qu'ils possèdent et qu'il n'y ait rien de particulier pour aucun d'eux.'"

Page 180:

"L'autorité maritale a donc pour fondement, au temps de Beaumanoir, le désir d'introduire la concorde et la stabilité au foyer par l'etablissement d'une direction unique. La femme est, non point une inférieure, mais une associée, qui n'est subordonée au mari que parce qu'il est chef de l'association. * * *"

Aubéry, page 203 (quoting from Molière, *L'Ecole des Femmes* IV, 2 (1663):

Le Notaire "Sais-je pas qu'étant joints on est par la coutume
Communs en meubles, biens, immeubles et conquêts,
A moins que par un acte on n'y renounce exprès?"

Aubéry, pages 239 and 240:

"En Normandie, à la différence de ce qui se passait dans les autres pays du Nord de la France, ou la communauté était d'un usage constant, la stipulation de ce régime était prohibée. Ainsi, d'après la Coutume normande, non seulement il n'existait pas de communauté de droit commun, mais encore toute communauté conventionnelle était interdite. Pourquoi les Normands, qui étaient de la même race primitive que les Francs, n'ont-ils pas admis le système nuptial des pays Coutumieurs? Une telle singularité s'explique par des considérations tirées de l'organisation de la famille dans la province de Normandie. La femme y avait une condition très humble, et le mari des pouvoirs étendus. Les Normands, qui joignaient à une insatiable cupidité une avarice proverbiale, n'ayant pu associer à leurs fortunes à travers les océans les femmes de leur pays d'origine, s'étaient unis à celles de la région qui'ils avaient conquise. Ces anciens pirates montrèrent peu d'égards pour leurs épouses, less considérant comme des étrangères, des personnes inférieures. C'est ce que fait remarquer Marcadé. 'Soldats farouches, conquérants avides, dit-il, less premiers Normands, en s'emparant de la Neustrie et en y prenant les femmes des vaincus, durent, à l'exemple des premiers Romains, voir dans leur mariage un rapport du maitre à l'esclave

plutot qu'une association donnant des droits communs aux personnes.' La femme normande était placée sous une sorte de tutelle perpétuelle; sa personnalité était très effacée. Son mari pouvait la battre,'sauf à ne pas lui crever les yeux et lui briser les bras', disait l'ancienne Coutume normande, rappelée par Basnage. Ses biens se trouvaient également sous la dépendance absolue du mari. Au surplus, le statut normand était pénétré du principe de la conservation des biens dans la famille. D'autres que les héritiers légitimes ne devaient pas être appelés à la succession. Aussi n'accorda-t-on que très tard des droits successoraux à la femme. Cet état de choses ne permettait guère à celle-ci d'obtenir des avantages pecuniaires dan l'association conjugale. Si donc la communauté fut privée de tout droit de cité en Normandie, la cause en était dans les conditions d'existence et les moeurs de ses occupants originaires, qui s'opposaient à ce que régime recut l'accueil qu'il mèritait. Tant il est vrai que la systéme matrimonial d'un peuple est d'autant moins relevé que la condition de la femme y est plus abaissée et s'éloigne davantage des idées de civilisation.' "

Page 382:

"L'absence d'une communauté de biens en Angleterre parait avoir une cause d'ordre politique. C'est vraisemblablement une conséquence de l'institution de l'aristocratie territoriale. On a tenu à concentrer les grandes fortunes et à en empêcher le morcellement."

Page 506:

"On dit que la femme est sacrifiée dans le régime de la communauté. Mais la prééminence légale du mari n'est-elle pas souvent illusoire? C'est une physionomie toujours vivante et vraie que celle du Chrysale de Molière, chef nominal de la communauté, maitre dans la

maison quand Philaminte partage son avis, croyant commander quand il obéit. Cette faiblesse maritale ne se voit-elle pas tous les jours? Que d'épouses habiles laissent à leurs maris l'illusion du gouvernement domestique! * * *"

Page 522:

"* * * En fait, dans tous les ménages ou régnent l'order et l'harmonie, la femme est l'auxiliaire, l'associée du mari, pour les actes saillants de la vie conjugale. Qui contestera son influence parfois silencieuse au sein du foyer? N'est-ce pas elle qui préside ou vaque aux travaux intèrieurs, qui s'occupe de l'ordonnance des affaires domestiques, qui lutte contre les milles contrariétées de l'existence familiale, qui courageusement supplée à l'insouciance ou à la paresse du mari en gagnant les moyens d'existence du ménage? 'Tout ce qui a rapport, dit le bon Rollin, au gouvernement intérieur d'une maison: voilà à proprement parler la science des femmes; voilà l'occupation que la Providence leur a assignée comme par préciput, et pour laquelle elle leur a donné plus de talent qu'aux hommes.' On a souvent cité ces vers de Molière, qui définissent si clairement l'économie domestique et attribuent à la compagne de l'homme son vrai role dans la maison:

> 'Former aux bonnes moeurs l'esprit de ses enfants,
> Faire aller son ménage, avoir l'oeil sur ses gens,
> Et régler la dépense avec économie,
> Doit être son étude et sa philosophie.'
> [*Les Femmes Savantes,* Act II, Scene 7.]

"On ne saurait mieux s'exprimer ni rencontrer plus juste. N'est-il donc pas équitable, en retour de cette mis-

sion active, que la femme soit admise à partager avec son mari les acqêts réalisés durant l'union?"

Page 553:

"A en juger pas les efforts des divers législateurs, on voit que l'humanité marche dans la voie du progrès social et de l'amélioration de la condition de la femme. De nos jours, dans les ménages, on trouve moins de misères morales ou physiques que par le passé."

The following is our translation of the excerpts from Aubéry quoted above.

Pages 25 and 26—This excerpt is translated, Note 14, *supra.*

Page 28:

In the first century following the birth of Christ appeared Plutarch's Precepts on Marriage. This work, a veritable treasure of ancient wisdom, elevates the soul and contains lessons of high domestic morality. According to the celebrated moralist, everything in marriage ought to be common, ideas and principles above all. [The remainder of this excerpt is translated page 53, *supra.*]

Page 180—This excerpt is quoted Note 7, *supra.*

Page 203—Quotation from Moliere, l'Ecole des Femmes IV, 2 (1663). This excerpt is translated, page 10, *supra.*

Pages 239 and 240:

In Normandy, differing from that which took place in the other countries of the north of France, where the community was in constant usage, contracting for this regime was prohibited. Thus, according to the Norman custom, not only community of common right did not exist, but even the conventional community was interdicted. Why did the Normans, who were of the same primitive race as the Franks, not admit the nuptial system of the countries

of the customs? [Here follows the excerpt quoted page 58, *supra.*] Continuing: The Norman wife was placed under a sort of perpetual tutelage. Her personality was very much effaced. Her husband could punish her "except that he could not put out her eyes or break her arms," said the ancient Norman Custom, recalled by Basnage. Her property was placed equally under the absolute power of the husband. Moreover, the Norman statute was saturated with the principle of conservation of property within the family. People other than legitimate heirs could not be called to the succession. Likewise, rights of succession were not accorded to the wife until very late. This state of affairs hardly permitted her to obtain pecuniary advantages in the conjugal association. If then the community was deprived of all common right in Normandy, the cause was in the conditions of existence and the customs of its original occupants, who were opposed to the regime receiving the reception that it merited. So much is it true that the matrimonial system of a people is the less advanced as the condition of woman is more abased and becomes more remote from the ideas of civilization.

Page 382—This excerpt is quoted page 57, *supra.*

Page 506:

It is said that the wife is sacrificed in the community regime. But is not the legal preeminence of the husband often illusory? A picture always living and true is that of Chrysale in Moliere, nominal head of the community, master in the house when Philaminte shares his opinions, believing himself to command when he obeys. Is not this marital infirmity seen every day? 'How many clever women leave to their husbands the illusion of being in authority] [The Molière reference is to *Les Femmes Savantes.*]

Page 522:

In fact, in all the households where order and harmony reign, the wife is the auxiliary, the associate of her husband, for the important acts of the conjugal life. Who will dispute her influence, sometimes silent, at the fireside? Is it not she who presides over or applies herself to interior labors, who occupies herself with ordering domestic affairs, who strives against the thousand contrarieties of family existence, who courageously supplies what is lacking due to the carelessness or the laziness of the husband in gaining the means of existence of the household? "All that which has relation," said the good Rollin, "to the interior government of a household: that, properly speaking, is the science of women; that is the occupation which Providence has assigned to them as a preferred gift, and for which it has given them more talent than it has given to men."

These verses of Molière which define so clearly the domestic economy and attribute to the companion of man her true role in the household have been often cited:

> To conform to good customs the character of her children,
> To conduct the household, keep an eye on the servants,
> And control expense with economy,
> Ought to be her study and her philosophy.
> [*Les Femmes Savantes,* Act II, Scene 7.]

It would be difficult to express the thought more exactly.

Pages 522, 553—The remaining excerpts are translated page 52, *supra.*

Nouveau Commentaire sur La Coutume de Paris, de Ferriere (Paris, 1770), Vol. 2, page 1:

"La communauté de biens qui fait la matière de ce titre,

est une société qui se contracte en pays coutumier, entre les futurs conjoints par mariage pour les biens meubles & conquêts immeubles faits durant & constant le mariage.

"Cette société a lieu par toute la France coutumiere, excepté dans les coutumes de Normandie, de Reims & d'Auvergne."

Pages 3 and 4:

Article CCXX

"De quels biens & de quel jour se contracte
la communauté.

"Hommes & femmes conjoints ensemble par mariage, sont communs en biens meubles, & conquêts immeubles faits durant & constant ledit mariage. Et commence la communauté du jour des épousailles & bénédiction nuptiale.

"Cet article etoit le 110 de l'ancienne coutume.

* * * * * * * *

"En biens meubles & conquêts immeubles.

"Cet article nous marque quels biens tombent dans la communauté de biens; savoir tous les meubles des conjoints; c'est-a-dire, tous les meubles & effets mobiliers de quelque nature & qualité qu'ils soient, & à quelque somme qu'ils puissent monter, par la raison que c'est la qualité de la chose qui les fait tomber dans cette communauté.

"Les meubles, sans distinction, tombent dans cette communauté, soit ceux qu'ils avoient lors de leur mariage, ou ceux qui leur sont échus ou à l'un d'eux pendant le mariage, sans distinguer de quel coté ou par quel moyen ils leur sont échus par succession ou donation en ligne directe, ou par succession en collatérale, ou par donation, legs ou autrement, il n'importe."

The following is our translation of the excerpts from de Ferriere, quoted above.

Page 1:

The community of goods which constitutes the matter of this title is a society which is contracted in a country of the customs between those joined by marriage, for movable property and immovable acquests made during the marriage.

This society is found in all France except in the customs of Normandy, of Reims and d'Auvergne.

Pages 3 and 4:

Article CCXX.

Of what goods and as of what day does the community take effect.

Men and women joined by marriage are common in movable property, and in immovable acquests made during the marriage. And the community commences on the day of the marriage.

This article was number 110 of the ancient custom.

* * * * * * * * * *

In movable goods and immovable property acquired.

This article indicates what properties fall in the community of goods; to wit, all the movable property of the spouses, that is to say, all personal property and effects of whatever nature and quality, regardless of what sum they may amount to, the reason being that it is the quality of the thing which makes them fall into the community.

Movables without distinction fall into the community, whether they are things that they [the spouses] had at the time of their marriage or those which have come to the one or the other during the marriage, without distinguishing from which side or through what means they have come, through succession or donation in a direct line, or through collateral succession, or through testamentary gift or otherwise, it makes no difference.

Blackstone's Commentaries, Book II, Cooley's Second Edition (Chicago, 1872), page *433, (referred to, Note 10, *supra*):

"VI. A sixth method of acquiring property in goods and chattels is by *marriage;* whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband with the same degree of property and with the same powers, as the wife, when sole, had over them.

"This depends entirely on the notion of an unity of person between the husband and the wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a *real* estate, he only gains a title to the rents and profits during coverture; for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in *chattel interests*, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain in the wife, or to her representatives, after the coverture is determined."

In Book I, page *444, after pointing out various limitations upon the wife's authority to perform legal acts, and that she was so far regarded as inferior to the husband that under the old law, moderated to some extent at the time Blackstone wrote, the husband "might give his wife moderate correction" (a privilege, he states, which "the

lower rank of people, who were always fond of the old common law, still claim and exert * * *), the author observes with apparent seriousness:

"These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England."

Pollock and Maitland, *The History of English Law*, Second Edition, Volume II, pages 402 and 403:

"Our own law at an early time took a decisive step. It rejected the idea of community. So did its sister the law of Normandy, differing in this respect from almost every custom of the northern half of France. To explain this by any ethnical theory would be difficult. We can not put it down to the Norsemen, for Scandinavian law in its own home often came to a doctrine of community. We can not say that in this instance a Saxon element successfully resisted the invasion of Norse and Frankish ideas, for thus we should not account for the law of Normandy. * * *"

"Misdoubting the possibility of ethnical explanations, we must, if we would discuss the leading peculiarities of our insular law, keep a few great facts before our minds. In the first place, we have to remember that about the year 1200 our property law was cut in twain. The whole province of succession to movables was made over to the tribunals of the church. In the second place, we are told that in France the system of community first became definite in the lower strata of society; there was community of goods between the *roturier* and his wife while as yet there was none among the gentry. We have often had occasion to remark that here in England the law for the great becomes the law for all. As we shall see below, the

one great middle-class custom that our common law spared, the custom of the Kentish gavelkinders, might with some ease have been pictured as a system of community. But in England, with its centralized justice, the habits of the great folk are more important than the habits of the small. This has been so even in recent days. Modern statutes have now given to every married woman a power of dealing freely with her property, and this was first evolved among the rich by means of marriage settlements."

On page 418 the authors speak of the gavelkind custom of Kent, under which the surviving spouse enjoyed so long as he or she remained single one-half of the land of the dead spouse, this right, whether enjoyed by the widow or widower, bearing the name of "free bench," going on to say, page 419, that in addition to this right the survivor very possibly was entitled to enjoy a possible guardianship over the other half of the land.

"* * * The law of socage land gives the wardship of the infant heirs of the dead spouse to the surviving spouse. In Kent it must have been common enough to see a widower or a widow enjoying the whole of the land left behind by the dead wife or husband.

"Probably it is upon some such scheme as this that feudalism has played. Here in England it destroys the equality between husband and wife. On the husband's death, the widow is allowed by way of dower one-third of his land at the utmost. * * *"

On page 432 it is said, quoting from authorities which the authors cite in the notes,

"And so he [the lay lawyer] said boldly that the whole mass belonged to the husband. 'It is adjudged that the wife has nothing of her own while her husband lives, and

can make no purchase with money of her own.' [Placit. Abbrev. p. 41, Northampton (4 John).] 'She had and could have no chattel of her own while her husband lived.' [Ibid. p. 96, Norf.] 'Whatsoever is the wife's is the husband's, and the converse is not true.' [Birtton, i. 227.] 'The wife has no property in chattels during the life of her husband.' [Y.B. 32-3 Edw. I, p. 186.] 'This demand supposes that the property in a chattel may be in the wife during the life of her husband, which the law does not allow.' [Y.B. 33-5 Edw. I. p. 313.]"

Schmidt, *The Civil Law of Spain and Mexico,* (New Orleans, 1851), page 12 (Book I, Title i, Ch. 4, Sec. 1):

"COMMUNITY OF GOODS.

"Art. 43. The law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced, in the manner prescribed in Section 3.

"Art. 44. To this community belong:

1. All the property of whatever nature which the spouses acquire by their own labor and industry.

2. The fruits and income of the individual property of the husband and wife.

3. Whatever the husband does gain by the exercise of a profession or office, e.g. as judge, lawyer, physician, &c.

4. The gains from the money of spouses, although the capital is the separate property of one of them.

"Art. 45. The property owned by either husband or wife before marriage does not belong to the community, nor the profits of the same, already due, although collected after the marriage.

"Art 46. Property acquired by either after marriage by a gratuitous title, such as inheritance, donation, or bequest, does not belong to the community.

"Art. 47. Nor does property acquired in exchange for other property belonging to one of them, nor that acquired by the produce of the sale of property belonging exclusively to one of the spouses.

"Art. 48. Money, expended in improving property belonging to one of the spouses, belongs to the community, but gives the other no claims to the property itself.

"Art. 49. Husband and wife are entitled to an equal share in the community, although one of them should, at the time of marriage, have been without any means. At the same time both are liable, in equal proportion, for the losses and debts incurred during its existence."

M. Troplong, *Du Contrat de Mariage,* being part of a larger work, *Droit Civil Explique,* Third Edition (Paris, 1857), pages 51 to 55, inclusive:

"35. Maintenant revenons sur cette idée, que la communauté rentre dans les conditions naturelles du mariage; demandons-nous si le Code civil a fait sagement, en l'élevant à l'état de régime légal de l'association conjugale.

"Cette question fut amplement débattue au conseil d'Etat; le droit écrit et le droit coutumier s'y trouvaient representés par les hommes les plus éminents. Chacun avait ses preédilections et ses défaveurs: il était difficile de s'accorder. Le droit romain était la loi la plus respectée dans les pays de droit écrit; on le mettait à un degré d'honneur et d'autorité bien au-dessus des simples coutumes. Or, le droit romain, se faconnant aux nécessités du mariage paien, avait adopté le régime dotal;

régime qui dominait dans les habitudes de l'Italie et des peuples romanisés. En dehors de la dot, les époux étaient séparés d'intérêt."

"37. Les provinces francaises régies par le droit écrit, ne connaissaient donc pas la communauté legalé. Là régnait le régime dotal dans toute sa hauteur; il s'y défendait par des considerations puissantes. Ce régime donne de grandes suretés à la femme, et augmente le pouvoir du mari. C'est le mari qui travaille, qui agit, qui soutient la fortune des conjoints: c'est lui qui doit profiter de ce labeur; son industrie ne doit enrichir que lui-même. C'est assez que l'épouse ait l'usage de cette heureuse abondance; elle ne contribue qu'à en régler l'usage: l'usage doit lui suffire. L'acquisition au profit due mari stimule sa vigilance et son industrie; l'usage des acquêts par la femme excite son économie. Mais la propriété des acquêts ne saurait lui appartenir. Si elle ne doit rien perdre, elle ne doit rien gagner. D'ailleurs, elle ne mérite pas de gagner, puisqu'elle na'a pas concouru par son travail à l'acquisition."

"Voilà donc quels sont les titres due régime dotal aux yeux de ses défenseurs. Supériorité de l'homme, infériorité de la femme, protection conservatrice donnée à sa faiblesse, toute la philosophie de ce régime est dans ces trois idées.

"38. Dans les pays coutumiers, c'était la communauté qui était le régime cher aux populations, et ce régime était si conforme aux usages et aux habitudes nationales, qu'il était le était le régime légal de ceux qui se mariaient sans conventions. – – 'Nos ancêtres,' dit Coquille [jurisconsulte, 1523-1603], 'ont introduit, par coutume, la communauté d'entre gens mariés en meubles et conquêts, et est vraisemblable que c'a été pour rendre les femmes plus soigneuses à conserver le bien de la maison, quand

elles savent y avoir part et profit, et afin que, comme leur esprit et leur corps son conjoints par union excellente, ainsi leurs biens soient en union.' J'aime ce langage, j'aime les idées qu'il exprime; cette philosophie de l'égalitè entre les époux me semble un grand progrès.

"39. Au moment ou un Code civil se préparait, la première question était de savoir si cette communauté légale, qui était attachée de plein droit à la célébration du mariage dans les pays coutumiers, devait être étendue aux pays de droit écrit, qui jusque-là-ne l'avaient pas connue, et qui, dans l'absence de contrat, laissaient les époux dans l'état de séparation de biens. Ce n'était donc pas entre le régime dotal et la communauté qu'il fallait opter; c'était entre la communauté et la séparation. Le régime dotal, ouvrage de la convention, était, en lui-même, hors de cause dans une question ou il ne s'agissait que de fixer l'état des parties qui n'avaient pas fait de convention.

"40. Réduite à ces termes, la lutte n'etait pas possible; la séparation est trop peu en harmonie avec les lois du mariage pour qu'on put l'ériger en droit commun. Le mariage est une société de deux personnes. Qu'y a-t-il donc de plus naturel que de soumettre au régime de la société, les biens dont elles sont propriétaires? Est-ce que la vie commune n'a pas pour conséquence la mise en commun de leur industrie, la confusion de tout le mobilier, la communauté des épargnes, comme des acquêts faits en commun? La séparation des biens, produit de ce relâchement des moeurs qui avait succédé dans Rome paienne a l'antique dépendance des femmes, la séparation des biens n'était adoptée, à défaut de contrat, dans les pays de droit écrit, que par un respect superstitieux pour le droit romain. La communauté est bien mieux assortie à la nature

du mariage: les époux, opèrent en commun, mêlent et confondent leurs meubles, leurs travaux, et pourvoient également a l'éducation et à l'établishment des enfants. C'est surtout dans la classe pauvre, qui ne fait pas ordinairement de contrat de mariage, que la communauté est appropriée à la situation des époux: dans cette classe, la femme travaille activement; par ses soins et ses travaux, elle contribue au bien-être commun, ou au soutien de la famille. Il convient donc de ne pas l'exclure des profits; il convient de l'intéresser au succès de l'union conjugale, et de l'admettre à y participer, à moins qu'il n'y ait d'autres conventions."

The following is our translation of the excerpts from Troplong, quoted above.

35. We now return to this idea, that community enters into the natural conditions of marriage; we inquire if the civil Code has done wisely in raising it to the legal regime of the conjugal relationship.

This question was fully debated in the council of state; the written law and the customary law were there represented by most eminent men. Each one had his preferences and his dislikes: it was difficult to come to agreement. The Roman law was the law most respected in the countries of written law; it was given a degree of honor and authority far above simple customs. Now the Roman law, basing itself upon the necessities of pagan marriage, had adopted the dotal regime; a regime which was dominant in the habitudes of Italy and the Romanized peoples. Outside of the dot the spouses were separate in interest.

37. The French provinces subject to the written law were not familiar with the legal community. There the dotal regime was fully dominant. It was defended by powerful considerations. This regime gives great assur-

ances to the wife and augments the power of the husband. It is the husband who works, who acts, who sustains the fortune of the spouses: it is he who ought to profit from this labor; his industry should not enrich anybody but himself. It is enough that the wife has the usage of this fortunate abundance; she makes no contribution other than to control its use: the use should be sufficient for her. Acquisition to the profit of the husband stimulates his vigilance and his industry; the wife's right to use property acquired stimulates her economy. But the ownership of the acquests should not belong to her. If she ought not to lose anything, she ought not to gain anything, since she has not contributed by her labor to acquisition.

The above, then, are the merits of the dotal regime according to the views of its defenders. Superiority of man, inferiority of woman, a conserving protection given to her weakness, all the philosophy of this regime is in these three ideas.

38. This paragraph is quoted Note 32, *supra*.

39. At the moment when a Civil code was being prepared, the first question was to know if this legal community, which in the countries of the customs attached in full vigor at the celebration of the marriage, ought to be extended to the country of the written law which until that time had not known it, and which in the absence of contract, left the spouses in the state of separateness of goods. It was not then between the dotal regime and that of the community that it was necessary to choose; it was between community and separate. The dotal regime, a product of convention, had in itself nothing to do with the case where the only question was to fix the status of parties who had not entered into a convention.

40. Reduced to these terms, conflict was not possible; separation is too little in harmony with the laws of marriage to be established as of common right.

[The rest of paragraph 40 is translated page 51, *supra*, with the exception of one sentence there indicated by asterisks. This sentence reads as follows]:

The separation of goods, product of that loosening of morals which in pagan Rome was consequent upon the ancient dependence of women, was adopted, in default of contract, in the countries of the written law solely because of a superstitious respect for Roman law.

Following is the original of the excerpt from Sanchez Roman, Derecho Civil Español, 2nd ed., Volume V, page 547, quoted page 51, *supra*:

"* * * se conforma con la *unidad* del matrimonio, á la vez que con el derecho y libertad individual de cada conyuge; presupone el respeto á los fines y bienes particulares de éstos, y reconociendo á la nueva personalidad, que el matrimonio engendra, *fines* que le son *peculiares,* distintos de aquéllos, parte de esta idea para derivar lógicamente la de la necesidad de *medios* económicos, que le sean también *exclusivos,* y asigna una propiedad individual á la entidad matrimonial, diferente de la propiedad individual de los cónyuges, entregando el manejo de ese patrimonio comun á la directión unitaria, generalmente del marido, sin dejar por eso de arbitrar ciertas garantías para el condominio que la mujer ostenta en dicha común propiedad conyugal."

FILE COPY

Supreme Court of the United States

No. 58

OCTOBER TERM, 1945.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE,

Appellant,

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

PETITION FOR REHEARING.

SIDNEY L. HEROLD,
CHARLES E. DUNBAR, JR.,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 58—OCTOBER TERM, 1945.

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE,

Appellant,

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SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

PETITION FOR REHEARING.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SAMUEL G. WIENER, WILLIAM B. WIENER and JACQUES L. WIENER, the appellees, now complaining of the opinion and judgment handed down herein on December 10th, 1945, pray that they be granted a rehearing.

For reason why such rehearing should be granted, your petitioners respectfully aver:

1.

The Court erred in reversing the decision of the District Court which had held the sections of the Revenue Act of 1942, here assailed by appellees, to be unconstitutional.

2.

The Court erred in holding that the death of the husband, domiciled in the State of Louisiana, creates a reasonable basis for a constitutional application of an estate tax measured by the value, not of what he owned, but of the entire community in which his wife was a co-equal owner.

3.

The Court erred in holding that in respect of spouses domiciled in the State of Louisiana, the death of the wife affords a basis for constitutionally exacting a tax measured by the value of the entire community, in which the husband was always the owner of half and the controlling manager of the other half: when such control, possession and management disappears on the wife's death.

ARGUMENT.

The opinion concedes, of course, that the statute is an inseparable one; i. e. that its application so as to include the value of the entire community in the compu-

tation of the estate tax is identical, whether it be the male or female spouse who happens to die first.

We, therefore, discuss both situations.

I.

THE PREDECEASE OF THE HUSBAND.

The opinion concedes the local property law to be as contended for by appellees; namely, that husband and wife are equal co-owners in indivision of every asset of the community from the instant of its acquisition, and that the wife's ownership is by the same onerous title as is the husband's.

The opinion, however, bases the right to tax the whole of the jointly owned property, on the death of the managing spouse, upon its finding that such death is the occasion of the establishment in the wife of new powers of possession and control.

For example, we quote from the opinion:

> "The death of the husband of the Louisiana marital community not only operates to transfer his rights in his share of the community to his heirs or those taking under his will. It terminates his expansive and sometimes profitable control over the wife's share, and for the first time brings her half of the property into her full and exclusive possession, control and enjoyment. The cessation of these

extensive powers of the husband, even though they were powers over property which he never 'owned', and the establishment in the wife of new powers of control over her share, though it was always hers, furnish appropriate occasion for the imposition of an excise tax. * * *

"Receipt in possession and enjoyment is as much a taxable occasion within the reach of the federal taxing power as the enjoyment of any other incident of property. The taking of possession of inherited property is one of the most ancient subjects of taxation known to the law. Such taxes existed on the European Continent and in England prior to the adoption of our Constitution.

"It is upon these principles that this Court has consistently sustained the application of estate taxes upon the death of one of the joint owners to property held in joint ownership, measured by the full value of the property so held. * * *

"It is the receipt in possession or enjoyment of the proceeds of a right previously acquired and vested upon which the tax is laid."

If what the Court says be now the constitutional law of the United States, then it equally follows, of course, that the coming of age of a minor affords a proper basis for the taxing of his entire estate, the possession and control of which had been, throughout the period of his disability, vested in his tutor or guardian. Likewise, when a trustee dies, holding property for himself and others in indivision as beneficiaries and the instrument of trust provides for a termination of the trust, a tax could be imposed. The opinion also compels the conclusion that

when an insane person recovers his reason, and thereupon takes back possession of his estate, theretofore committed to his committee or curator, an excisable event occurs.

Or to bring the matter closer to the case at bar:

When divorce occurs, every legal incident seized upon here by the Court as occasion for the validation of the tax, happens in identically the same manner as upon the death of the spouse. For example, the community is dissolved. With its dissolution, there ends completely the former possession, managerial powers, and what the Court denominates the husband's "expansive and sometimes profitable control over the wife's share". The divorce, too, "for the first time brings her half of the property into her full and exclusive possession, control and enjoyment".

So that no incident pertaining to property, or possession, occurs upon the death of the husband that does not likewise occur in case of divorce.

Is it to be thought that Congress could enact an excise tax on the happening of that event?

But in Louisiana, as we endeavored to point out in brief and in argument, it is not necessary for either death or divorce to occur in order to put an end to the community.

The action of separation of property, which in no way disturbs—unless within the realm of psychological imponderables—the marital status, accomplishes every legal situation with respect to rights of property, or possession, or management that death or divorce invokes.

Is the success of the wife in obtaining such judicial liquidation of the community the occasion for a federal excise tax?

It is respectfully submitted that when the Court selects the mere fact that the loss of the husband-agent leaves the wife free to possess and administer her undivided one-half, as the constitutional occasion for the imposition of a tax upon the passage by death, not of the whole but of the husband's half, its decision wholly ignores all previous adjudications. These case were cited in our brief, to which the Court is respectfully referred.

Counsel firmly believe, and respectfully submit, that the decision here, for the first time establishes a new and exceedingly dangerous precedent, in that the Court has completely departed from the theory upon which it had previously sustained the right of Congress to exact death taxes, namely that such tax is one upon transfers or at least the shifting of real and substantial economic interests. Moreover, it would sanction constitutionally, as we have pointed out in our brief, the confiscation of estates; and furthermore, the decision lays entirely to one side economic benefit to the survivor as a basis for the tax, and seizes upon a mere factual incident which may, or may not be beneficial, as validating an exaction

upon what never passed by death, but what had always belonged to the survivor.

II.

THE PREDECEASE OF THE WIFE.

When the Court comes in its opinion to discuss the non-separable statute from the viewpoint of the situation existing when the wife dies first, it then proceeds to depart entirely from the principle upon which it held the tax valid when it was the husband who was the first to die.

Plainly, the husband receives no possession by his wife's death; he already had full possession. He receives no control by his wife's death; he already had control. Indeed, both possession and control were his over the entirety: not merely over the half which was his, but over his wife's half as well. That is the basis of the Court's decision in the case in which the husband dies first.

As the Court has previously pointed out:

> "The management of the community is entrusted to the exclusive control of the husband, and he may deal with and dispose of community property with *no liability to account to the wife so long as the community continues.* The rule is, however, that the husband may not give away any of the immovables, nor a quota of the movables, nor may he fraudulently make any alienation of property 'to injure his wife'. So long as the community continues, the wife has no control over community property." (Italics ours.)

What, then, does the husband receive when, by the death of his wife, he loses his control, loses his management, and loses all of those powers of enjoyment over the half which was his wife's and which passed, not to him, but to his wife's heirs?

This Court has consistently admonished that taxation is an essentially *practical* matter. We state the situation pragmatically since, as we conceive the jurisprudence, psychological factors afford no basis for the imposition of excises. No tax is laid either upon grief or relief at the termination of the marital relation. It is the acquisition of a right of property, of possession, or some other practical factor affecting property, which affords the only base for the valid levy of an excise. Let us see, therefore, whether any such factor exists. And in doing so, with the indulgence of the Court, we take up the various reasons assigned in the opinion.

For example, the Court says:

(a) "Her death, by ending the marital community, liberates her husband's share from the restrictions which the existence of the community had placed upon his control of it".

A study of the law of Louisiana, leaves us in complete ignorance of such restrictions. Moreover, the previous observations of the Court with respect to the situation where the husband dies first, emphasize that there are no restrictions whatever upon the husband's power over his half. Whatever restrictions there be upon the hus-

band are with reference to the wife's one-half. He has, during the marriage, the complete ownership of his half and the sole management and control of his wife's half. His management, so far as *his* half is concerned is absolute, for it arises out of ownership. So far as his wife's half is concerned, the agency is charged with certain limitations which grow out of the duty of honesty and are based on restrictions upon gratuitous alienation. These limitations, we repeat, relate only to the *wife's half*. Even as to the wife's half it is not to be thought that the release of an agent from the duty of honesty, would constitute the acquisition of a right.

But, the Louisiana community partnership law and the Court's summary of the Louisiana community partnership law make clear that these limitations and restrictions on the husband's management, referred to by the Court, are, as a matter of reality and practical legal effect, only applicable to the *wife's one-half* interest in the community partnership property. There are no restrictions on the husband whatsoever and he has no accountability as to the handling and disposition of *his* half of the community partnership property either during marriage or after marriage. Furthermore, these limitations and restrictions on the husband do not have any *legal* or *practical operation* under the law of Louisiana with regard to the husband's authority and power to dispose of and handle the community partnership property including his half of the property *in any way he sees fit during the existence of the community.* He has the legal authority and power as manager of the community partnership to pay his separate debts with

community property or give away community partnership property completely and effectively, and the wife, during the existence of the community partnership cannot prevent him from paying his separate debts or making donations in fraud of her property rights. The wife, however, has the right, when the community partnership is dissolved, to force the husband to account for and reimburse her for any part of her one-half of the community partnership property which he has disposed of or given away in fraud of her rights.

The restrictions on the Louisiana husband in legal and practical effect, therefore, do not apply to his one-half of the community partnership property and only apply to the wife's half of the community partnership property, and even then the restrictions on the husband as to the wife's half only impose a duty on him to account for and reimburse the wife at the *dissolution* of the community partnership, if it can be shown that he violated his fiduciary obligations and has improperly disposed of her half of the community partnership property during the existence of the partnership.

It is significant that the Court in its discussion of the shifting of economic benefits in the case of the prior death of the wife apparently overlooked the fact that although the husband can legally and effectively give away or dispose of the community partnership property consisting of both his half and the half of his wife *during the existence* of the community partnership as manager of the partnership, and is only accountable at the

dissolution of the community partnership for his wife's half of the property, when the community partnership is finally dissolved by death or otherwise, the husband *loses* his statutory agency and authority to deal with and dispose of the community partnership as a whole, and thereafter, he can only legally and effectively dispose of the one-half of the community partnership property which *belongs to him.*

Moreover, so far as limitations upon the right to make donations are concerned, these exist solely for the benefit of the wife. For example, the husband may give away the whole community, and no one may complain except the other spouse, and even then only after the dissolution of the community partnership and the accountability is only to reimburse the wife for any part of *her half* of the community partnership property improperly disposed of in violation of his fiduciary obligation. The disability is not as respects the world; it is a limitation only of *eventual accountability* at the *dissolution* of the partnership upon his otherwise *absolute* power of management and control of his wife's interest during the existence of the partnership.

Now, when the wife dies, and with her death there disappears any restriction upon the giving away of her half of the property without eventual accountability, what right has the husband acquired? The wife's undivided half, free of his management and the restrictions of the agency, passes to her heirs or legatees. The husband acquires no right of property or of possession. The

wife's half goes to her successors, entirely free of the former management and control of the husband. Not only does he acquire nothing on his wife's demise, but he loses whatever possession or control he had before.

And loss of property, or of such rights as those of possession or control, has never before been suggested as the occasion for taxing the loser.

(b) The Court says: "He acquires by her death the right to have his share of the community separated from hers by partition and to hold it free of all controls".

But, again, to look at what actually happens in real life: the husband puts his time, energy and ability into the acquisition of an estate. Those efforts result in the building up of property of which, in law, he owns only one-half. He has, during the marriage, that economic control over the entirety which enables him to do practically as he pleases, except that he is accountable to his wife, at the termination of the community partnership, for dishonesty and improper gifts or disposition of the community partnership property, insofar only as the wife's half of the community partnership is concerned. His wife dies and leaves her property to strangers, or to her kin. As to all that of which the husband had such broad control during the marriage, the picture has changed in kaleidoscopic fashion. He no longer has any control. He becomes an owner in indivision with outsiders. He has lost the power to sell, except as to his

undivided one-half. He cannot mortgage, except that one-half. He can make no lease, except as to his undivided one-half. And it needs no argument to convince this Court that never is an undivided one-half interest in property worth one-half of the full property. Co-ownership with strangers is traditionally a decided detriment. All of those incidents which, as to the wife's half, according to the Court's opinion, afford a base for the imposition of a tax upon the entirety upon the husband's predecease have wholly vanished—not to the husband's gain this time, but to his utter loss.

And yet, the Court infers that all of those factors which beyond dispute cause economic loss to the husband, give rise to the right of Congress to tax him for his loss. Truly, it is a novel concept that under the American system of government, a tax may be levied upon a loss: when under all previous judicial announcements the basis for the right to excise has been an economic benefit.

And as to the suggestion of the Court that the death of the wife gives the right to the husband to a partition, may we respectfully suggest that while the community lasts, a partition would be to the husband's detriment, since he has his half and the control of his wife's half. The situation, therefore, which gives rise to the right to partition is one which has damaged the husband, not benefited him.

During his wife's lifetime, the husband in Louisiana holds his half of the community partnership property as

a tenant in common with his wife. After her death, which brings about the dissolution of the community partnership, he holds his undivided one-half in the community partnership as a tenant in common with the wife's heirs. If the right to have the property partitioned is a beneft to his estate, justifying the adding of his estate to the wife's estate in calculating the estate taxes due the government, then Congress may, without constitutional objection, tax in the estate of a beneficiary or beneficiaries of any trust that portion of the estate of the trustee which is held in indivision with the beneficiaries. Likewise, Congress may, under the Constitution, impose a tax in the event of the death of any partner, measured by the undivided interest in the partnership of every other partner because, upon the death of any partner, the partnership is usually dissolved and a partition of the property may be demanded. It is inconceivable, that, on the theory that a right to partition property held as tenants in common is a benefit, this Court would uphold a statute imposing an estate tax having such an intolerable and confiscatory application and effect.

(c) The Court says: "Here too, the wife's death brings into being a new set of relationships with respect to his share of the community as well as hers, among which are new powers of control and disposition which are proper subjects of an excise tax measured by the value of his share".

The "new set of relationships" referred to by the Court are not defined. Whatever they may be, they have arisen to the detriment, not to the benefit, of the husband, as

we before pointed out. And, yet, those undefined "new sets of relationships" which can be only to the injury of the husband, are said by the Court to be "proper subjects of an excise tax measured by the value of his share".

(d) With the Court's statement "personal and psychological forces have great importance in the practical determination of how community property shall be managed by the husband", we have no quarrel. This is an obvious fact. But does the Court mean to say that the dissolution of a marriage, when it involves a cessation of wifely "psychological" interference, is of such benefit to the husband as to constitute an economic benefit, and hence to be excisable?

The very fact that a husband may consult his wife in the administration of community property, or that a wife might interpose her own views and, through feminine tactics, control her husband's judgment, hardly give rise to legal relationships. This no doubt occurs in common law states with reference to similar matters. The husband may be influenced by someone other than his wife, or perhaps the wife may be wholly ignorant of the community administration. At any rate these psychological imponderables hardly partake of that *practical nature* which, this Court has all along emphasized, controls in matters of taxation.

But if there were basis for the Court's finding, it is hardly to be thought that in view of the Tenth Amend-

ment, Congress possesses any power to tax because of those imponderable incidents of the marital relationship.

Again, we point out that every factor, including the imponderable incidents, occurs in the case of divorce or separation. Moreover, they all, with the exception perhaps of the "imponderables", occur when there is a judgment of separation of property.

It seems impossible to distinguish the practical consequences so far as relates to the dissolved community in the case of death and that of either of the other situations to which we have referred.

With the utmost respect, we submit that there cannot be found in the case of the predecease of the wife any possible shift of economic interest, of economic benefit, or of any practical right by which the husband is the gainer which could, consistently with due process, be regarded as reason or basis for the taxation of something with respect to which neither ownership, possession or control, or any benefit, passes by death. It is respectfully submitted that the opinion of the Court introduces a wholly new and novel concept, namely, the right to impose an excise upon the sustaining of a distinct economic loss.

It is respectfully submitted that a rehearing should be granted.

Your petitioners further represent that this case is one of great consequence to the welfare and economic set-

up of eight of the states of the Union. This is fully discussed in the brief *amici curiae* filed by the Attorneys General of the community property states. The case involves the constitutionality of an Act of Congress, and its decision is far reaching in its implications affecting the status of property within these states. For these reasons, counsel seriously and respectfully submit that the rehearing should be granted.

WHEREFORE, petitioners pray that such rehearing be granted.

They further pray for whatever orders and decrees may be necessary, and for general relief.

SIDNEY L. HEROLD,
CHARLES E. DUNBAR, JR.,

Attorneys for Petitioners.

We hereby certify that the above and foregoing petition for rehearing is filed in good faith, and not for delay.

January 16, 1946.

SIDNEY L. HEROLD,
CHARLES E. DUNBAR, JR.,

Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

No. 58.—October Term, 1945.

Joachim O. Fernandez, United States Collector of Internal Revenue, Appellant, *vs.* Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[December 10, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

In this case the Commissioner of Internal Revenue, proceeding under § 811(e)(2) of the Internal Revenue Code, 26 U. S. C. § 811(e)(2), as amended by § 402 of the Revenue Act of 1942, 56 Stat. 798, has levied an estate tax on the termination of the marital community by the death of the husband, a domiciled resident of Louisiana, the tax being measured by the value of the entire community property. And, on the authority of § 811(g)(4) of the Code, 26 U. S. C. § 811(g)(4), as amended by § 404 of the same statute, he also included in decedent's gross estate the entire proceeds of insurance policies on the decedent's life.

The principal questions for decision are (1) whether the power asserted by the statute, to tax the entire community interest, is within the taxing power of the United States; (2) whether the tax infringes the due process clause of the Fifth Amendment; (3) whether the taxing statute contravenes the command of Article I, § 8 of the Constitution that "excises shall be uniform throughout the United States"; (4) whether the tax so far as it is measured by the surviving wife's share of the community property, is a direct tax, invalid because not apportioned as required by Article I, § 8 of the Constitution; and (5) whether the tax invades the powers reserved to the states by the Tenth Amendment.

Appellees, the children and sole heirs of decedent, brought this suit in the District Court for Eastern Louisiana, to recover from appellant, the collector, as an alleged overpayment, so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of his wife's share of the community property, and of all, rather than half, of the insurance money. The

district court of three judges gave judgment for appellees, 60 F. Supp. 169, holding that the statute as applied violated the due process clause of the Fifth Amendment. The case comes here on direct appeal from the judgment of the district court under § 2 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 349a, appellant assigning as error the lower court's ruling that the statute denied due process, and the court's failure to sustain the levy as a constitutional exercise of the federal taxing power.

The facts as found by the district court are not in dispute. In 1907, decedent, a resident of Louisiana, married a Louisiana resident with whom he lived in that state until his death, his wife surviving. During the marriage he carried on in Louisiana various kinds of business. With the exception of certain real estate located in Mississippi, all the property of decedent at the time of his death was held in ownership by the marital community which existed between him and his wife. At no time during the existence of the community was the wife gainfully employed outside the household, nor did she receive from any one any salary or other compensation for personal services, nor was any part of the community property derived originally from any separate property of her own. Decedent, having by his will constituted appellees his sole heirs, and having no debts of consequence, no administration was had on his estate, and appellees were by judgment of the probate court placed in possession of all decedent's property.

Appellees filed the federal estate tax return, in which they reported only one-half of the net value of the commuity property as subject to the tax. Included in the community property, and also reported to the extent of only one-half, were the proceeds of fifteen policies of insurance on the life of decedent, all of which were (a) effected by decedent during the marriage, (b) named the wife as beneficiary, and (c) reserved the right to the insured of changing the beneficiary. All of the premiums on these policies had been paid from community funds. The Commissioner assessed a deficiency in estate tax based upon respondents' failure to include in the gross estate, subject to tax, the entire value of all the community property, and the proceeds of the fifteen insurance policies. Appellees paid the deficiency and, following rejection of their claim for refund, brought the present suit to recover the amount of the deficiency payment which has resulted in the judgment in their favor.

Section 402 of the Revenue Act of 1942 amended § 811(e) of the Internal Revenue Code, 26 U. S. C., § 811(e), so as to include in the gross estate of decedent, subject to the estate tax:

> "(2) Community Interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State . . . . of the United States, . . . except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."[1]

The revenue laws make no provision for the distribution of the burden of the tax beyond providing that the tax shall be a lien on all of the property included in the decedent's gross estate. Section 827(a) I. R. C., 26 U. S. C. § 827(a). See *Detroit Bank* v. *United States*, 317 U. S. 329, 331-333. Section 826(b) of the I. R. C. contemplates that the tax "be paid out of the [taxable] estate before its distribution," unless otherwise directed by decedent's will. Although the share of the surviving spouse is subject to the lien and the tax must be paid out of the estate as a whole, the federal statute leaves it to the states to determine how the tax burden shall be distributed among those who share in the taxed estate. See *Riggs* v. *Del Drago*, 317 U. S. 95.

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[1] Section 811 of the Internal Revenue Code (26 U. S. C. § 811) as amended by § 404 of the Act of 1942, provides that the taxable value of the gross estate of the decedent shall be determined by including the value at the time of his death of

"(g) Proceeds of life insurance

"(1) . . . To the extent of the amount receivable by the executor . . .

"(2) . . . To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other considerations, paid . . . by the decedent, . . . or (B) with respect to which the decedent possess at his death any of the incidents of ownership. . . . .

"(4) . . . For the purposes of this subsection, premiums . . . paid with property held as community property by the insured and surviving spouse under the law of any State, . . . shall be considered to have been paid by the insured, . . . except such part thereof, as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

Appellees' argument is in substance that the nature of community property is such that husband and wife each has, by virtue of the establishment of their marital community, and from its beginning, a present half interest in such property; that the death of either effects no transfer or relinquishment of any interest in the property other than that of the half share which the decedent had before his death; and that the survivor in consequence of the death of the other spouse acquires no new or different interest in the property, but only retains the half share he or she had prior to the death of the other spouse. From this appellees conclude that the death of either spouse is not an event which in any case can bring more than one-half of the community property within the reach of the power to "lay and collect . . . imposts and excises" conferred on Congress by Article I, § 8 of the Constitution, and that the present amendment taxing the entire value of the community property on the death of either spouse is a denial of due process because the death of neither operates to transfer, relinquish or enlarge any legal or economic interest in the property of the other spouse. Hence it is said that the statute infringes due process by adding to the concededly valid tax on the decedent's half share a further tax measured by the one-half interest of the surviving spouse. Further, it is urged in support of the due process contention, that the statute arbitrarily and capriciously invents different rules of taxation whose alternative application is governed by a single consideration, namely, which will yield the greater tax; and that the statute creates a presumption contrary to state law, and having no rational basis in fact, that the entire community is owned or economically attributable to the spouse first tio die. It is also argued that even if Congress could validly impose the tax where, as here, the husband is first to die, there is no basis for the tax where the wife dies first, and that since the statute purports to apply in either case, and is not separable, it cannot be validly applied in this.

It is also contended that the tax is not uniform as required by Article I, § 8, Clause 1 of the Constitution, because the joint interests of husband and wife in community property states are taxed according to a different and more onerous standard than is applied to comparable joint interests, and specifically to tenancies in common and limited partnerships, created under the laws of other states in which the presumption is not applied; and because the statute disregards for purposes of taxation the property laws

of the community property states, while recognizing the property laws of other states for those purposes.

It is said too that the levy is a direct tax, invalid because not apportioned (Article I, § 9, Clause 4 of the Constitution), insofar as it contemplates collection of part of the tax out of the wife's half of the community property, since, it is said, there is no excisable event touching her property on her husband's death and the tax collected out of her property is in effect a direct tax upon it. And finally the tax is said to invade the powers reserved to the states by the Tenth Amendment, to determine property relationships within their borders.

The merits of these contention cannot be accurately appraised without some inquiry as to the nature of respective spouses' community property interests as defined by Louisiana law. We have had occasion in several earlier cases to make some examination of the laws governing the interests of the spouses in community property states. See e. g., *Moffitt* v. *Kelley,* 218 U. S. 400; *Poe* v. *Seaborn,* 282 U. S. 101; *Bender* v. *Pfaff,* 282 U. S. 127; *Commissioner* v. *Harmon,* 323 U. S. 44. Counsel for appellees concede that the opinion in *Bender* v. *Pfaff, supra,* so far as it goes, correctly defines the several interests of the spouses in Louisiana community property. To that we now add a more detailed statement so far as it may be relevant to the decision of the present case.

By the law of Louisiana, every marital status subject to the laws of the state superinduces a partnership or community of the spouse with respect to property in the state acquired during the life of the community, unless there be at the time of the marriage a stipulation to the contrary.[2] All earnings and all property acquired by the husband or wife during the life of the community become community property, with certain limited exceptions not here involved, and which need not be detailed further than to say that the spouses can acquire some separate property during marriage.[3] It is said that all property acquired by the spouses during the marriage which falls into the community is "due to the joint

[2] Dart's Louisiana Civil Code (1945) Article 2399.

[3] *Id.,* Article 2402; see Troxler *v.* Colley, 33 La. Ann. 425. The income from the separate property of the husband, and of such of the wife's separate property as is given over to the husband's management also falls into the community by Article 2402, *supra;* see also Hellberg *v.* Hyland, 168 La. 493.

or common efforts, labor, industry, economy, and sacrifices of the husband and wife," and that for this reason the husband and wife each has at all times an equal present interest in an undivided half of the whole community.[4] The management of the community is entrusted to the exclusive control of the husband,[5] and he may deal with and dispose of community property with no liability to account to the wife so long as the community continues.[6] The rule is, however, that the husband may not give away any of the immoveables, nor a quota of the moveables, nor may he fraudulently make any alienation of property "to injure his wife."[7]

So long as the community continues, the wife has no control over community property. She may not give it away, nor sell it, and in general, may not bind it for the payment of her debts.[8] But upon the termination of the community,[9] she, her heirs or other

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4 Succession of Wiener, 203 La. 649; see also Phillips *v.* Phillips, 160 La. 813, 825 *et seq.*

5 Dart's Louisiana Civil Code (1945) Article 2404.

6 McCaffrey *v.* Benson, 40 La. Ann. 10; Frierson *v.* Frierson, 164 La. 687.

7 Dart's Louisiana Civil Code (1945) Art. 2404. The rights secured to the wife by this inhibition on gifts apparently may not be enforced against the husband or those taking under him either during the life of the community or after its termination. The sole remedy is a suit against the donee to recover the property in his hands, Bister *v.* Menge, 21 La. Ann. 216; Frierson *v.* Frierson, *supra*, and even such a suit apparently may not be maintained until after the termination of the community. Daggett, The Community Property System of Louisiana (1931) 24. Where the husband has aliened some part of the community in fraud of his wife's rights, she or those representing her have an action for reimbursement against the husband or his representatives upon the termination of the community, but not before. Guice v. Lawrence, 2 La. Ann. 226, 228. The fraud required for an action of this kind seemingly must be intentional and the motive for the transfer. See Art. 2404, *supra;* Succession of Packwood, 12 Rob. (La.) 334, 364-5; Exposito *v.* Lapeyrouse, 195 So. 814 (La. App.).

8 Bywater *v.* Enderle, 175 La. 1098; D. H. Holmes *v.* Morris, 188 La. 431.

9 Dart's Louisiana Civil Code (1945) Articles 2406, 2425. At the dissolution of the community, the share of each spouse in the partnership's assets is credited with one-half of the amount by which the other spouse's separate property has been enhanced in value by the application thereto of community funds or of common labor, *id.*, Article 2408; Dillon *v.* Dillon, 35 La. Ann. 92. The wife's share must also be credited with one-half of the amount of community funds expended to pay the husband's separate debts, Glenn *v.* Elam, 3 La. Ann. 611, although those debts may be satisfied during the community by levy upon community property. Davis *v.* Compton, 13 La. Ann. 396.

The community relationship ends upon the death of one spouse, divorce, separation from bed and board, or, in the absence of these, upon a judgment of judicial separation of property. See Dart's Louisiana Civil Code (1945), Articles 2425, 2427, 2430. Only the wife may request such a separation, and the separation is not a mere matter of consent between the spouses. Driscoll *v.* Pierce, 115 La. 156. She must show that her dowry rights or other separate property entrusted to the husband are in danger owing to her

designees receive in full possession and enjoyment one-half in value of the total community assets subject to the payment of community debts.[10] This right so to receive one-half is indefeasible, and if she die first, her heirs or legatees take her half-share to the exclusion of the husband; if the husband die first, his half passes to his heirs or as he has directed, and the other half is the wife's.[11]

Examination of the legislative history of the challenged statute, as disclosed by the Committee Hearings and Reports and the Congressional debates, can leave no doubt that the purpose of Congress in enacting it was the elimination of what was believed to be an unequal distribution of the tax burdens of estate taxes which led Congress to apply to community property the principles of death taxes which it had already applied to other forms of joint ownership, on the death of either of the joint owners. The Report of the House Committee recommending the adoption of the amendment to § 811 of the Internal Revenue Code pointed out the preferential treatment accorded by the federal estate tax laws to community property. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35 to 37, 160.[12]

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husband's mismanagement or financial embarrassment, or that like conditions render it doubtful that she or the children of the marriage will have the benefit of her own earnings, or of her future acquisitions of separate property. Davock *v.* Darcy, 6 Rob. (La.) 342; Webb *v.* Bell, 24 La. Ann. 75; Meyer *v.* Smith, 24 La. Ann. 153; Jones *v.* Jones, 119 La. 677.

[10] Dart's Louisiana Civil Code (1945) Articles 2406, 2409, 2430.

[11] See Succession of Wiener, *supra*.

[12] The report stated:

"For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In the non-community-property States, all such property is regarded as belonging entirely to the husband. The difference in the amount of the Federal estate tax is enormous as shown by the following tables: . . ."

The tables show the great disparity between the estate tax levied on community property upon the death of the husband who had accumulated it and the death of the husband in like circumstances in non-community states. The tax upon an estate of $100,000 being $500 in a community property state and $9,500 in non-community property states. In the case of a $5,000,000 estate the tax saving in a community property state would amount to as much as $485,800, the saving on a $10,000,000 estate in a community property state amounting to as much as $1,171,800.

The proposed amendment, it was said, "eliminates special estate tax privileges enjoyed by decedents of community property estates." To the same effect is S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231. The inequity inherent in allowing spouses in community property states to bear a lighter

There is no dispute as to the construction or operation of the provisions of the statute. Appellees do not deny that the Commissioner correctly applied the statute and correctly computed the tax if the statute is valid. Here, as will presently appear, there is no basis for saying that the statute, either in its purpose or in its practical effect, operates to regulate matters whose regulation the Constitution reserved to the states. It is a revenue measure enacted in the exercise of the federal power to lay and collect an excise. Congress has a wide latitude in the selection of objects of taxation, *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 12; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 581, and even under the equal protection clause of the Fourteenth Amendment, which was not included in the Fifth, the states may distinguish, for purposes of transfer taxes, between property which has borne its fair share of the tax burdens and similar or like property passing to the same class of beneficiaries which has not. *Watson* v. *State Comptroller*, 254 U. S. 122. Hence we are concerned only with the power of Congress to enact the tax.

It is true that the estate tax as originally devised and constitutionally supported was a tax upon transfers. *Knowlton* v. *Moore*, 178 U. S. 41; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50. But the power of Congress to impose death taxes is not limited to the taxation of transfers at death. It extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death. See *Bromley* v. *McCaughn*, 280 U. S. 124, 135, *et seq.*

Congress may tax real estate or chattels if the tax is apportioned, and without apportionment it may tax an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property. *Bromley* v. *McCaughn*, *supra*; *Burnet* v. *Wells*, 289 U. S. 670, 678; cf. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 267-8; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582. The power to tax the whole necessarily embraces the power to tax any

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tax burden than their counterparts in other states had been brought to Congressional attention on other occasions. See e. g., President Roosevelt's message to Congress June 1, 1937, H. Doc. No. 260, 75th Cong., 1st Sess., p. 5; also Reports to the Joint Committee on Internal Revenue Taxation, Vol. 2, Part II (1933), pp. 15, 118-121, 139-140.

of its incidents or the use or enjoyment of them. If the property itself may constitutionally be taxed, obviously it is competent to tax the use of it, *Hylton* v. *United States,* 3 Dall. 171; *Billings* v. *United States,* 232 U. S. 261, or the sale of it, *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363, 670, or the gift of it, *Bromley* v. *McCaughn, supra.* It may tax the exercise, non-exercise, or relinquishment of a power of disposition of property, where other important indicia of ownership are lacking. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Chase National Bank* v. *United States,* 278 U. S. 327; *Estate of Rogers* v. *Commissioner,* 320 U. S. 410; cf. *Graves* v. *Schmidlapp,* 315 U. S. 657 with § 811(d)(f) of the Internal Revenue Code, 26 U. S. C. § 811(d)(f).

If the gift of property may be taxed we cannot say that there is any want of constitutional power to tax the receipt of it, whether as the result of inheritance, *Stebbins* v. *Riley,* 268 U. S. 137, or otherwise, whatever name may be given to the tax, and even though the right to receive it, as distinguished from its actual receipt and possession at a future date, antedated the statute. Receipt in possession and enjoyment is as much a taxable occasion within the reach of the federal taxing power as the enjoyment of any other incident of property. The taking of possession of inherited property is one of the most ancient subjects of taxation known to the law. Such taxes existed on the European Continent and in England prior to the adoption of our Constitution.[13]

It is upon these principles that this Court has consistently sustained the application of estate taxes upon the death of one of the joint owners to property held in joint ownership, measured by the full value of the property so held. We upheld a like tax when applied to tenancies by the entirety in *Tyler* v. *United States,* 281 U. S. 497; *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577, and to property held in joint tenancy in *United States* v. *Jacobs* and *Dimock* v. *Corwin* (companion cases), 306 U. S. 363.

Decision in these cases was not rested, as appellees argue, on the ground that the tax was imposed on a gift made by the husband who had created the tenancy, viewed as a substitute for a testamentary transfer, or on any event which antedated the death of

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[13] Nielsen *v.* Johnson, 279 U. S. 47, 54, *et seq.*; Gleason & Otis, "Inheritance Taxation" (4th ed.), p. 243 *et seq.* Feudal "relief" was a payment exacted of the heir for the privilege of admission to possession of the land of his ancestor. Digby, "History of the Law of Real Property" (5th ed.) p. 40.

one of the joint owners. Instead, as we said in *Whitney* v. *Tax Commission*, 309 U. S. 530, 539, "the emphasis in these cases [was] on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax." We pointed out in *Tyler* v. *United States, supra*, 503, 504, that the use, possession and enjoyment of the joint property which was joint before the death was thereby made exclusive in the survivor, and thus constituted a "definite accession to the property rights" of the survivor. These circumstances were thought sufficient to make valid the inclusion of the property in the gross estate which forms the primary basis for the measurement of the tax. And in *United States* v. *Jacobs supra*, this Court sustained the tax, assailed on due process grounds, when applied to a joint tenancy created before the enactment of the taxing statute. We said, 306 U. S. at 371, that the subject of the tax was not the gift to the wife made by the husband's creation of the joint tenancy for himself and wife, but the change in possession and enjoyment of the entire property, occasioned by the death of one of the joint tenants, and that the tax was appropriately measured by the value of the entire property. "Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time and not its creation at an earlier date which furnishes the basis of the tax." *Griswold* v. *Helvering*, 290 U. S. 56, 58. Compare *Saltonstall* v. *Saltonstall, supra*, 271.

a tax upon

Similarly, the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process, *Reinecke* v. *Trust Co.*, 278 U. S. 339, nor does a tax upon the receipt of income which was earned and due before the enactment of the taxing statute. *Brushaber* v. *Union Pacific R. Co., supra*, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Taft* v. *Bowers*, 278 U. S. 470, 483, 484; *Cooper* v. *United States*, 280 U. S. 409, 411. It is the receipt in possession or enjoyment of the proceeds of a right previously acquired and vested upon which the tax is laid. Such was deemed to be the taxable event under our earlier death taxes: *Clapp* v. *Mason*, 94 U. S. 589; *Vanderbilt* v. *Eidman*, 196 U. S. 480. And see *Moffitt* v. *Kelly, supra*.

With these general principles in mind we turn to their application to federal death taxes laid with respect to the interests in community property. As we have seen, the death of the husband of

the Louisiana marital community not only operates to transfer his rights in his share of the community to his heirs or those taking under his will. It terminates his expansive and sometimes profitable control over the wife's share, and for the first time brings her half of the property into her full and exclusive possession, control and enjoyment. The cessation of these extensive powers of the husband, even though they were powers over property which he never "owned", and the establishment in the wife of new powers of control over her share, though it was always hers, furnish appropriate occasions for the imposition of an excise tax.

Similarly, with the death of the wife, her title or ownership in her share of the community property ends, and passes to her heirs or other appointees. More than this, her death, by ending the marital community, liberates her husband's share from the restrictions which the existence of the community had placed upon his control of it. He acquires by her death, the right to have his share of the community separated from hers by partition and to hold it free of all controls. He obtains, for the first time, the right to give away his immovables, and the right to give away his moveables as a whole or by a fraction of the whole. Here too, the wife's death brings into being a new set of relationships with respect to his share of the community as well as hers, among which are new powers of control and disposition which are proper subjects of an excise tax measured by the value of his share. And while we do not rest decision on the point, it is of some significance that this shift of legal relationships effects a shift in point of economic substance. The precept that the wife is equal co-owner with her husband of community property undoubtedly calls into play within the marital relationship personal and psychological forces which have great importance in the practical determination of how community property shall be managed by the husband. Though it may be impossible fully to translate these imponderables into legal rules, the death of the wife undoubtedly brings, in every practical aspect, greater freedom to the husband in his disposition of that share of community property which is technically his, than is to be gathered solely from a reading of statutes and case law.

This redistribution of powers and restrictions upon power is brought about by death notwithstanding that the rights in the property subject to these powers and restrictions were in every

sense "vested" from the moment the community began. It is enough that death brings about changes in the legal and economic relationships to the property taxed, and the earlier certainty that those changes would occur does not impair the legislative power to recognize them, and to levy a tax on the happening of the event which was their generating source.

The principles which sustain the present tax against due process objections are precisely those which sustained the California tax, measured by the entire value of community property in *Moffitt* v. *Kelly, supra.* There the Court recognized that the surviving wife took her share of the property on her husband's death, not as an heir, but as an owner of an interest, the right to which she acquired before the death and before the enactment of the taxing act. But the levy upon the entire value of the community was sustained, not as a tax upon property or the transfer of it, but as a tax upon the "vesting of the wife's right of possession and enjoyment arising upon the death of her husband", which the Court deemed an appropriate subject of taxation, notwithstanding the contract, equal protection and due process clauses of the Constitution.[14] So far as *Coolidge* v. *Long*, 282 U. S. 582, is inconsistent with *Moffitt* v. *Kelley, supra*, and the contentions now urged by the Government, the application of the reasoning of the *Coolidge* case, to the taxation of joint or community interests must be taken to have been limited by our decisions in *Tyler* v. *United States, supra,* and *United States* v. *Jacobs, supra,* and the cases following them.

What we have said of the nature and incidence of the tax on community property in large measure disposes of the various other contentions of appellees. Since the levy is an excise and not a property tax, the case is not one of taking the survivor's property to pay the tax on decedent's estate. As the tax is upon the surrender of old incidents of property by the decedent and the acquisition of new by the survivor, it is appropriately measured by the value of the property to which these incidents attach. The tax burden thus laid is not so unrelated to the privileges enjoyed by

14 The force of Moffitt *v.* Kelly, *supra,* as an authority controlling the taxation of community property in Louisiana where the wife's interest is vested before the death of the husband, is not impaired by the fact that the California courts later held that the wife's interest in community property in that state is not so vested. Cf. United States *v.* Robbins, 269 U. S. 315 with United States *v.* Malcolm, 282 U. S. 792. The Moffitt case was decided upon the assumption that the wife's interest was "vested".

the taxpayers who are owners of the property affected that it can be said to be an arbitrary exercise of the taxing power. *Milliken* v. *United States*, 283 U. S. 15; *Burnet* v. *Wells, supra*, 678-9. Compare *Saltonstall* v. *Saltonstall, supra.* While it may generally be true, as appellees argue, that neither the husband nor wife gains any over-all financial advantage when the other dies, it suffices that the decedent loses and the survivor acquires, with respect to the property taxed, substantial rights of enjoyment and control which may be of value. Liability to the tax, in order to avoid constitutional objection, does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits of the most favored owner at a given time and place. *Corliss* v. *Bowers*, 281 U. S. 376; *Reinecke* v. *Smith*, 289 U. S. 172; cf. *Burnet* v. *Guggenheim*, 288 U. S. 280.

We find no basis for the contention that the tax is arbitrary and capricious because it taxes transfers at death and also the shifting at death of particular incidents of property. Congress is free to tax either or both, and here it has taxed both, as it may constitutionally do, in order to accomplish "the purposes and policy of taxation" to protect the revenue and avoid an unequal distribution of the tax burden. *Watson* v. *Comptroller, supra.*

Even if it could be thought to affect the constitutionality of the taxing statute, it is plain that the statute does not depend for its operation upon any presumption that the entire community property is owned or economically attributable to the spouse first to die. Save as the statute itself grants an exemption by such attribution, so far as the community property "may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse", the tax is laid without regard to the economic source of the community property. Apart from the exemption, it is, as we have seen, the shifting at death of the incidents of the property, regardless of origin, which is the subject of the tax.

The present statute, which was enacted in order to secure a more equitable distribution of the burden of federal death taxes,[15] is assailed because the tax is lacking in uniformity. But the uniformity in excise taxes exacted by the Constitution is geograph-

[15] See footnote 12, *ante*.

ical uniformity, not uniformity of intrinsic equality and operation. *Knowlton* v. *Moore, supra,* 83-109. The Constitution does not command that a tax "have an equal effect in each State", *id.* p. 104. It has long been settled that within the meaning of the uniformity requirement a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases,* 112 U. S. 580, 594. See also *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392-3; *Bromley* v. *McCaughn, supra,* 138; *Steward Machine Co.* v. *Davis, supra,* 583.

The amendment taxing community property interests is applicable throughout the territory of the United States wherever such interests may be found. There is no lack of geographical uniformity because in some states they are not found. For a taxing statute does not fall short of the prescribed uniformity because its operation and incidence may be affected by differences in state laws. *Phillips* v. *Commissioner,* 283 U. S. 589, 602; *Riggs* v. *Del Drago, supra,* 102. "Differences of state law which may bring a person within or without the category designated by Congress as taxable may not be read into the Revenue Act to spell out a lack of uniformity" in the constitutional sense. *Poe* v. *Seaborn, supra,* 117-8.

Appellees suggest that interests in tenancies in common and limited partnerships are very like interests in community property, and that if the tax is to be uniform, the one cannot be taxed unless the other ~~is~~ also. But even if it be as appellees argue, that
are common law family partnership or other arrangements with different names can be so devised that the marital relationship is attended by the same powers and restrictions as those derived from the laws of the community property states, and that they are differently or more lightly taxed than community property interests, we find no lack of uniformity in the constitutional sense. The present amendment is geographically uniform in its application to the only subject of which it treats, community property interests, and it levies in every state an identical tax upon the subject matter included within its terms—~~a~~ defined property interest s created by state law, having a common historical origin, a common name, and constituting a ~~universally recognized~~ distinct class of property interests.

There can be no doubt that the selection of such a class for taxation would not offend against the Fifth Amendment, or even the Fourteenth, merely because it did not attempt to reach casual arrangements resulting from individual agreements. Taxes must be laid by general rules. See *State Railroad Tax Cases*, 92 U. S. 575, 612; *Head Money Cases, supra*, 595; *LaBelle Iron Works* v. *United States, supra*, 392; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 424. Considerations of practical administrative convenience and cost in the administration of tax laws afford adequate grounds for imposing a tax on a well recognized and defined class, without attempting to extend it so as to embrace a penumbra of special and more or less casual interests which in each case may or may not resemble the taxed class. *Burnet* v. *Wells, supra*, 278; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511; *Rapid Transit Co.* v. *New York*, 303 U. S. 573, 582-3; *Madison Avenue Offices* v. *Browne*, appeal dismissed, No. 368 of this term. Such interests would be but isolated specimens of the attorney's art, and likely to resist efforts to identify them with the taxable subject.

Appellees' contention that the uniformity clause precludes such classification would in effect add to the constitutional restraints upon Congress an equal protection clause more restrictive than that of the Fourteenth Amendment, and is without judicial or historical support. This Court in *LaBelle Iron Works* v. *United States, supra*, 392, *et seq.* recognized that the uniformity clause, beyond requiring geographical uniformity in the application of the particular tax laid by the taxing act, could not be taken to impose greater restrictions on Congress' power to tax than those which the equal protection clause places upon the states. We reaffirm what this Court has many times held, that the constitutional command that "Excises shall be uniform throughout the United States" refers to geographical uniformity in the application of the particular excise which Congress has prescribed. We conclude that it adds nothing to restrictions which other clauses of the Constitution may impose upon the power of Congress to select and classify the subjects of taxation. It requires only that what Congress has properly selected for taxation must be identically taxed in every state where it is found.

An excise tax, which the Constitution requires to be uniform, laid upon the shifting at death of some of the incidents of property,

could hardly be thought to be a direct tax which must be apportioned. See *Bromley* v. *McCaughn, supra*, 138. The contention that such a tax is direct because measured by the property whose incidents are shifted at death, was rejected in *Bromley* v. *McCaughn, supra*, and in *Tyler* v. *United States, supra*, 501-4, and *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160, 165. A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property. "The persistence of this distinction and the justification for it rests upon the historic fact that [excise] taxes of this type were not understood to be direct taxes when the Constitution was adopted, and, as well upon the reluctance of this Court to enlarge, by construction, limitations upon the sovereign power of taxation by Article I, § 8, so vital to the maintenance of the national government." *Bromley* v. *McCaughn, supra*, 137.

The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government. *United States* v. *Darby*, 312 U. S. 100, 123-4. The amendment has clearly placed no restriction upon the power, delegated to the national government to lay an excise tax *qua* tax. Undoubtedly every tax which lays its burden on some and not others may have an incidental regulatory effect. But since that is an inseparable concomitant of the power to tax, the incidental regulatory effect of the tax is embraced within the power to lay it. It has long been settled that an Act of Congress which on its face purports to be an exercise of the taxing power, is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. In such a case it is not within the province of courts to inquire into the unexpressed purposes or motives which may have moved Congress to exercise a power constitutionally conferred upon it. *Sonzinsky* v. *United States*, 300 U. S. 506, 513-514, and cases cited.

We conclude that the tax here laid with respect to the community property infringes no constitutional provision.

The inclusion of all the proceeds of decedent's life insurance policies within his gross estate for purposes of estate taxation, requires no extended discussion. There is no contention that the proceeds of the policies are not made taxable by the terms of § 311(g) of the Internal Revenue Act as amended by § 404 of the

Revenue Act of 1942.[16] The amendment indicates on its face the purpose to bring the provisions for the taxation of the proceeds of insurance policies payable at death into harmony with the amendment taxing community interests, and the court below seems to have regarded, as do the parties here, the disposition of the questions affecting the tax on community interests, as determinative of the validity of the tax on the proceeds of the policies. But it is sufficient for present purposes that the tax is laid upon the amount receivable by the wife as a beneficiary of the policies on the death of her husband, and that the husband possessed at his death an incident of ownership, the power to change the beneficiaries.

For reasons which we have already fully developed in this opinion, the death of the insured, since it ended his control over the disposition of the proceeds, and gave his wife the present enjoyment of them, may be constitutionally made the occasion for the imposition of an indirect tax measured by the proceeds themselves. *Stebbins* v. *Riley, supra,* 141; *Chase National Bank* v. *United States, supra.*

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[16] Footnote 1, *ante.*

SUPREME COURT OF THE UNITED STATES.

No. 58.—October Term, 1945.

Joachim O. Fernandez, United States Collector of Internal Revenue, Appellant, vs. Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[December 10, 1945.]

Mr. Justice Douglas, concurring.

Prior to the Revenue Act of 1942 there was a great lack of uniformity among the States in the incidence of the federal estate tax. In most of the States the accumulations of the husband (who typically is the bread-winner) were taxed in their entirety on his death. In the community property states the tax generally reached only half of the accumulations because of the theory that they were the product of the wife's as well as of the husband's activities. It was this disparity which Congress sought to eliminate. As stated in the House Report (H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35-37),

> "For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband."

There are contained in the Report tables showing the difference in the amount of the federal estate tax in the community property States and in the other States, after which the Committee makes the following comment,

> ". . . in some instances there is an entire exemption from the Federal estate tax for the reason that the omission of one-half of the community property reduces the husband's net estate below the minimum exemption of $40,000. Moreover, this halving of community property greatly reduces the estate tax because of the progressive rates. For example, under the

present law, a net estate of $50,000 will pay an estate tax of $500 in a non-community-property State and no tax in a community-property State. An estate of $100,000 will pay a tax of $9,500 on the death of the husband in a non-community-property State and a tax of $500 on the death of the husband in a community-property State.

"If the wife dies within 5 years of her husband, the remaining $50,000 upon which the husband paid no estate tax will be subject to an estate tax of $500. Thus, the total tax paid on this $100,000 estate in the community-property State will be $1,000 as compared with $9,500 in the non-community-property State or a tax saving of $8,500. In the case of a $5,000,000 estate, the tax saving in a community-property State will amount to as much as $485,800 and in the case of a $10,000,000 estate, the tax saving in a community-property State will amount to as much as $1,171,800."

And see S. Rep. No. 1631, 77th Cong., 2d Sess., p. 231.

Much may be said for the community property theory that the accumulations of property during marriage are as much the product of the activities of the wife as those of the titular bread-winner. But I can see no constitutional reason why Congress may not credit them all to the husband for estate tax purposes. The character and extent of property interests under local law often determine the reach of federal tax statutes. *Helvering* v. *Stuart*, 317 U. S. 154, 161-162, and cases cited. And see Cahn, Local Law in Federal Taxation, 52 Yale L. Journ. 799. Yet that is not always so. *United States* v. *Pelzer*, 312 U. S. 399. Taxation is eminently a practical matter. Congress need not be circumscribed by whatever lines are drawn by local law. It may rely, as *Tyler* v. *United States*, 281 U. S. 497, 502-503, held, on more realistic considerations and base classifications for estate tax purposes on economic actualities. It was held, to be sure, in *Hoeper* v. *Tax Commission*, 284 U. S. 206, that a State could not assess against the husband an income tax computed on the combined total of his and his wife's income. But I can see no reason why that which is in fact an economic unit may not be treated as one in law. For as Mr. Justice Holmes pointed out in his dissent, there is a community of interest "when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source." And he went on to say "Taxation may consider not only command over, but actual enjoyment of, the property taxed." 284 U. S. pp. 219-220. Cf. *Helvering* v. *Clifford*, 309 U. S. 331, 335-337.

The Congress has not gone the full distance here. It has not included in one estate all the property owned by husband and wife. So far as this case is concerned, it has only included in the estate of the husband the accumulations which under the community property system are deemed to have been produced by the joint efforts of him and his wife. I can see no obstacle to that course unless it be the uniformity clause of the Constitution. Art. I, Sec. 8, Clause 1. But there can be no objection on that score. On the facts of this case the law goes no further than to eliminate the estate tax advantage which a married rancher, business man, etc., in Louisiana has over those similarly situated in the common law States. Congress, to be sure, has disregarded the manner in which Louisiana divided "ownership" of property between husband and wife. But as between husband and wife, notions of "vested interests", "ownership", and the like, established by local law, are no sure guide to what "belongs" to one or the other in any practical sense. We would be blind to the usual implications of the intimate relationship of marriage if we forced Congress to treat such divisions of "ownership" the same way it does divisions of "ownership" among strangers. I find no such compulsion in the Constitution.

Mr. Justice Black joins in this opinion.